Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick Wolfe, L.L.P.; Jackson & Campbell, P.C.; Singer and Associates, P.C., and John Craig,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Rule 14.5 Appendix Correction Filing
December 30, 2003

QUESTIONS PRESENTED

Misusing its own appellate rules that are statutorily based upon the Federal Rules of Appellate Procedure, D.C. Code §11-743, and departing from its practice of following Federal court precedent in interpreting its appeal rules, the District of Columbia Court of Appeals has denied a civil litigant the right to appeal, despite that petitioner's filing two documents stating appeal-intent with the trial court within the time to note an appeal. The question presented is:

1. Does the action of the D.C. Court of Appeals in refusing to accept petitioner's timely-filed documents as the "functional equivalent" of a Notice of Appeal conflict with this Court's holding in *Smith v. Barry*, 502 U.S. 244 (1992), and *Houston v. Lack*, 487 U.S. 266 (1988); conflict with three decisions of the U.S. Court of Appeals for the District of Columbia Circuit interpreting F.R.A.P. 3 and 4 for invocation of jurisdiction: *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881 (1987); *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 148 (2002); and *Ruggierio v. Federal Communications Commission*, 278 F. 3d 1323 (2002); and conflict with the D.C. Code §11-743 adoption of F.R.A.P.?

LIST OF PARTIES AND RULE 29. 6 STATEMENT

This matter involves final action by the D.C. Court of Appeals in refusing to hear the appeal of petitioner-plaintiff Words, Inc. from an adverse ruling by the Superior Court for the District of Columbia, Bayly, J.. The present petitioner is Words, Inc., which was the plaintiff in the trial court and the appellant before the D.C. Court of Appeals. Other parties below, who will constitute the respondents before this Court, are defendants Norman Singer; Piper Marbury Rudnick & Wolfe, L.L.P (presently named Piper Rudnick, L.L.P.); Jackson & Campbell, P.C.; Singer and Associates, P.C.; and John Craig.

Petitioner Words, Inc. is a corporation organized under the laws of Virginia. There is no parent corporation and no publicly held corporation owing 10% or more of this corporation's stock. Sup. Ct. R. 29.6

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CITATIONS TO OPINIONS AND ORDERS BELOW

The opinion of the D.C. Court of Appeals granting appellees' motion to dismiss the Words, Inc. appeal, is reported *sub nom, Words, Inc. v. Singer et al.*, 810 A. 2d 910 (D.C. 2002), App. 49. The original panel of the D.C. Court of Appeals denied without explanation Words, Inc.'s motion, filed after the reported decision of that court, to invoke appeal jurisdiction through documents other than a captioned Notice of Appeal, unreported order dated February 28, 2003, App. 52. (For Sup. Ct. R. 13.5 purposes, this February 28, 2003 Order is the judgement sought to be reviewed.) Words, Inc. on March 12, 2003 filed for rehearing *en banc* of the denial of its motion to invoke appeal jurisdiction on the basis of the alternative documents, and this request for *en banc* review was denied in an Order from the D.C. Court of Appeals dated June 26, 2003. App. 53.

STATEMENT OF BASIS OF JURISDICTION

This Court's jurisdiction is founded upon its authority stated in 28 U.S.C.§2104; 28 U.S.C.§1257; and Sup. Ct. R. 13.1 to review a final civil judgment of the D.C. Court of Appeals, which is considered a state court of last resort pursuant to 28 U.S.C. §2113; 28 U.S.C. §1257(b); and Sup. Ct. R. 47.

The D.C. Court of Appeals denied petitioner Words, Inc.'s motion (to invoke appeal jurisdiction through documents other than the formal Notice of Appeal), in an unreported order dated February 28, 2003. Words, Inc. on March 12, 2003 filed for rehearing *en banc* of the denial of its motion to invoke appeal jurisdiction on the basis of the alternative documents, and this request for *en banc* review was denied in an Order from the D.C. Court of Appeals dated June 26, 2003. Words, Inc. applied for and was granted an

enlargement of time by The Chief Justice until October 24, 2003 to file its Petition for a Writ of Certiorari. Clerk's letter, Application No. 03A230, September 17, 2003. This Petition is re-submitted under Rule 14.5 after an appendix correction requested by the Clerk's letter of October 31, 2003.

STATUTES AND RULES INVOLVED IN THIS CASE

This case involves interpretation of D.C. App. Rules 3 and 4, which are set forth in the Appendix. These D.C. App. Rules are derived directly from F.R.A.P. 3 and 4, also set forth in the Appendix. This Petition also requires interpretation of D.C. Code §11-743, which states that the D.C. Court of Appeals "shall conduct its business in according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." App. 13.

STATEMENT OF THE CASE

Petitioner Words, Inc. filed a Complaint alleging legal malpractice against the respondents-defendants in the Superior Court of the District of Columbia, Civ. No. 00-5875, on August 8, 2000. On May 15, 2002, that Superior Court of the District of Columbia, Bayly, J., granted the respondents-defendants' motion for summary judgment and denied petitioner-plaintiff Words, Inc.'s motion for summary judgment. Final orders of the Superior Court of the District of Columbia can be appealed to the D.C. Court of Appeals by filing a Notice of Appeal with the trial court within 30 days. D.C. Code §11-721(a)(1); D.C. App. R. 4(a).

Within 30 days of the trial court's grant of summary judgment against it, petitioner-plaintiff Words, Inc. filed–and

served on all respondents-defendants–two documents with the Superior Court of the District of Columbia:

*May 30, 2002: Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 69(a);

* May 30, 2002: Plaintiff's Rule 41(a)(1)(i) Notice of Voluntary Dismissal of First Amended Complaint Count 2 and Count 3.

Both of these May 30, 2002 filings are reproduced in App.35, 39, and stated Words, Inc.'s **intent to appeal** the trial judge's May 15, 2002 order granting summary judgment to the defendants. The Rule 41(a)(1)(i) Notice indeed stated that, App. 39:

> Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint . . . .

The Words, Inc. Rule 59(e) motion requested the trial judge to alter and amend the judgment "to document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court . . ." to one of the attorneys for a respondent-defendant who was dismissed as a defendant in the trial court's entry of summary judgment against petitioner-plaintiff Words, Inc.. App. 35. The Words, Inc. Rule 59(e) motion also sought to have the trial judge permit amendment of the summary judgment record to include voluminous back-up documents to Fed. R. of Evid. 1006 summary financial evidence submitted as part of plaintiff's motion for summary judgment.

On September 4, 2002 (docketing date, after August 30, 2002 signature), the trial judge responded to petitioner-plaintiff's Rule 59(e) motion in an order stating that his telephone calls to the defendant's attorney were designed to expedite scheduling motions hearings and involved no discussion of any merits issue. The trial judge declined to permit supplementation of the summary judgment record with the voluminous financial documents, concluding that such transfer "of a different or expanded record to the appellate court [ought not to be allowed because it would] skew appellate review." App. 44. Petitioner-plaintiff Words, Inc. separate Rule 41(a) motion to dismiss the First Amended Complaint was assigned to another judge in Superior Court for the District of Columbia and was never subject to a signed order.

Petitioner-plaintiff had relied upon its May 30, 2003, Rule 59(e) motion to suspend the time for noting an appeal, see D.C. App. R.4 (a)(1), which states that "[t]ermination of time for filing notice of appeal" occurs when any of six post-judgment motions are filed with the trial court. Accordingly, petitioner did not file its formal Notice of Appeal with the trial court until August 27, 2002, within 30 days of the trial judge's August 30/September 4, 2002 denial of the Rule 59(e) motion but outside the 30-day time limit for appeal of the May 15, 2002 summary judgment.

The D.C. Court of Appeals dismissed Words, Inc.'s appeal because it determined that the relief requested in the Rule 59(e) motion was not sufficiently substantive or the kind available under Rule 59, and "did not subject the order to modification." *Words, Inc. v. Singer et al.*, 810 A. 2d 910, 911 (D.C. 2002).[1] This D.C. Court of Appeals' depiction of

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1. The sixth category of appeal-tolling motions set forth in D.C. App. 4(a)(2) is broad: "any other motion seeking relief

the Words, Inc. Rule 59(e) motion meant that the 30-day time to appeal the May 15, 2002 summary judgment was not terminated by the Rule 59(e) motion; Words, Inc.'s September 27, 2002 formal Notice of Appeal was thus untimely and required dismissal of the appeal. *Words, Inc. v. Singer et al.* did, however, acknowledge that: "Appellant's post-judgment motion asked only for supplementation of the record for the purpose of raising certain issues on appeal." *Words, Inc. v. Singer,* 810 A. 2d at 911.

Pursuant to D.C. Code §11-743, the D.C. Court of Appeals had promulgated its Rule 3(a)(1) by adapting the text of F.R.A.P. 3(a), and this state court has frequently looked to Federal court precedent to interpret ambiguous efforts to invoke appeal jurisdiction.[2] Petitioner Words, Inc. pressed Federal case law authority, especially that from the United States Court of Appeals for the District of Columbia Circuit, to the D.C. Court of Appeals and attempted to invoke the

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in the nature of the foregoing." This catch-all means to toll appeal time was not addressed by the D.C. Court of Appeals in *Words, Inc. v. Singer et al.* The holding in *Words, Inc. v. Singer et al.* that Words, Inc.'s Rule 59(e) motion to the trial court was not adequate to terminate and toll the appeal time, is not directly challenged in this Petition for a Writ of Certiorari.

2. For this petition, the two most salient features of D.C. App. Rules 3(a) and 4(a), and analogous F.R.A.P. 3 and 4, are that there is no particular form for a Notice of Appeal, F.R.A.P. 3(c)(4), and that a Notice of Appeal mistakenly sent to the Court of Appeals, rather than the Superior Court or the U.S. District Court, enjoys the filing date with the wrong court and is transmitted to the trial court preserving this original filing date with the incorrect court. F.R.A.P. 4(d).

jurisdiction of the D.C. Court of Appeals on the basis of the two documents filed with the trial court within 30 days of the original, May 15, 2002 summary judgment against Words, Inc.. Both the Words, Inc. Rule 59(e) motion to amend the judgment and supplement the record and the Words, Inc. Rule 41 motion to dismiss the First Amended Complaint, stated Words, Inc.'s **intent to appeal** the May 15, 2002 summary judgment, and both filings were motivated by Words, Inc.'s desire to have an adequate appeal record but one unencumbered by any pending amended complaint. See, e.g., Words, Inc's proposed order tendered to the trial judge to supplement the record for appeal. App. 38.

The D.C. Court of Appeals refused to permit its jurisdiction to be invoked by the May 30, 2002 Rule 59(e) motion or the May 30, 2002, Rule 41 motion to dismiss the First Amended Complaint. The D.C. Court of Appeals further refused to address the Federal question presented by its appeal-invocation rules being derived from F.R.A.P. 3 and 4, D.C. Code §11-743. This state court also deviated from its practice of following Federal precedent to decide controverted notice of appeal issues. See *Tuppling v. Britton*, 411 A. 2d 349, 351 (D.C. 1980). The D.C. Court of Appeals also declined to consider highly persuasive decisions–granting appeal jurisdiction in disputed notice of appeal cases–from the U.S. Court of Appeals for the D.C. Circuit.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A. Substantial Federal question, pressed to the state court and not decided on independent and adequate state-law grounds

District of Columbia Code §11-743 requires the D.C.

Court of Appeals to "conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modification of those Rules." The F.R.A.P. are prescribed by this Court under it's authority set forth in 28 U.S.C. §2072. As this state court civil litigation progressed, petitioner's appeal rights necessarily came to turn on a construction of an important Federal law question. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

The Federal question was pressed repeatedly by petitioner to the D.C. Court of Appeal. App. 52, 53. Refusal to grant appeal jurisdiction to petitioner Words, Inc., on the basis of that petitioner's May 30, 2002 appeal-intent documents filed with the trial court, was never justified as being compelled by some modification of the F.R.A.P. stated in the D.C. App. Rules. Where the same analysis was used–or should have been used–to decide the interwoven state and federal law questions, no independent and adequate state law grounds exists to insulate the state court decision from this Court's supervisory review. *Fitzgerald v. Racing Association*, 123 S. Ct 2156, 2159 (2003); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 (1990).

B. Conflict with U.S. Court of Appeals for the District of Columbia Circuit and with this Court.

This Petition should be granted pursuant to this Court's Rule 10(b). The D.C. Court of Appeals' interpretation of its jurisdiction-invoking rules in D.C. App. Rules 3 and 4 and its refusal to hear[3] Words, Inc.'s civil appeal are in

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3. The blunt refusal of the D.C. Court of Appeals to analyze Words, Inc.'s functional equivalent bases for invoking for jurisdiction is extraordinary given D.C. Code §11-743 and

striking conflict with *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. Cir. 1987), which endorsed the functional equivalency rule and held that even a F.R.A.P. 10(b) filing limited to declining a transcript, sufficiently signaled the appellant's intent to appeal to satisfy the notice requirements in F.R.A.P. 3. *Nichols* is highly instructive for petitioner Words, Inc.'s plight, because Nichols filed a premature and void Notice of Appeal but was saved by her filing the transcript declination within the appeal time limit. In *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 148, 157 (D.C. Cir. 2002), the D.C. Circuit inferred intent to appeal from the petitioner's statement of issues, despite petitioner filing a flawed F.R.A.P. Petition for Review that failed to comply with the mandatory F.R.A.P. 15(a)(2)(C) term to specify the agency order appealed from. *See also Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C. Cir. 2002)(timely brief was "functional equivalent" of a F.R.A.P. Petition for Review and invoked appeal jurisdiction).[4]

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given that state court's acceptance of Federal authority as "persuasive" in *Tuppling v. Britton*, 411 A. 2d at 351. Moreover, prior to the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, decisions of the D.C. Court of Appeals were subject to review by the U.S. Court of Appeals for the D.C. Circuit. D.C. Code §11-301(2).

4. See also *Brannan v. United States,* 993 F. 2d 709, 710 (9th Cir. 1993)(*pro se* letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983), *cert. denied,* 461 U.S. 934 (1984) (defendant's letter to District Court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P.).

Other circuits have found functional equivalents of timely notices of appeal in circumstances similar to that experienced by petitioner. See *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal itself filed within appeal time and was functional equivalent of F.R.A.P. 3(a) notice of appeal). See also *Haugen v. Nassau County Dept. of Soc. Services*, 171 F. 3d 137, 138 (2d Cir. 1999), citing *Smith v. Barry*, 502 U.S. 244 (1992), and holding that even though the U.S. District Judge denied a letter-request for extension of time to file and appeal, the letter requesting the extension was filed within the appeal limit (but on the last day for noting an appeal), identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal to invoke jurisdiction, largely because the letter from the Nassau County Attorney stated that the County "will appeal" the judgment in favor of an age discrimination plaintiff. This petitioner Words, Inc.'s May 30, 2002 filings with the trial court were notably stronger statements of intent to appeal than customarily accepted by the Federal courts. Unable to point to any local modification of the F.R.A.P. jurisdiction-invoking procedures, the D.C. Court of Appeals should not have trampled on petitioner's appeal rights in a major legal malpractice case.

Certiorari should also be granted for this petitioner under this Court's Rule 10(c). This Court endowed the functional equivalency rule for disputed notices of appeal and cross-appeal in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). A companion case, *Houston v. Lack*, 487 U.S. 266 (1988), held that under F.R.A.P. 4(a)(1), a pro se prisoner's notice of appeal was timely filed when delivered to prison authorities for forwarding to the U.S. District Court, despite arrival of the notice of appeal at the District Court outside the appeal time limit. *See also Smith v. Barry*, 502 U.S. 244,112 S. Ct. 678, 116 L.Ed. 2 678 (1992), holding that a pro se briefing form filed by a prison inmate with the U.S.

Court of Appeals for the Fourth Circuit within time for appeal, was the functional equivalent of timely Notice of Appeal and invoked appeal jurisdiction because it provided sufficient notice of appeal intent. This Court observed in *Smith v. Barry,* 502 U.S. at 248, that despite the prisoner's motivation in filing the form brief being to respond to an order from the U.S. Court of Appeals for the Fourth Circuit, the briefing form still gave notice to the adverse parties and the Court of inmate Smith's intent to appeal. In this Petition by Words, Inc., there is no question that the May 30, 2002 documents filed by Words, Inc. in the Superior Court for the District of Columbia, were served on the respondents-defendants; named all parties; and identified and gave notice of Words, Inc.'s intent to appeal the trial judge's May 15, 2002 summary judgment in favor of the respondents-defendants.

C. Congruence of D.C. App. Rules 3 and 4 with F.R.A.P. 3 and 4 for jurisdiction-invocation.

The D. C. App. Rules in their entirety are *in pari materia* with the F.R.A.P. according to D.C. Code §11-743. The D.C. App. Rules 3 and 4 and parallel Federal Rules of Appellate Procedure 3 and 4 are set forth in the Appendix and are nearly verbatim. No modification of the D.C. App. Rules as to the adequacy of a notice of appeal under F.R.A.P. 3 and 4 to invoke civil appeal jurisdiction, has been identified. Where the D.C. App. Rule and F.R.A.P. are identical, the D.C. Court of Appeals had conceded that the *pari materia* provision in D.C. Code §11-743 called for viewing Federal court interpretations of F.R.A.P. as "persuasive authority in interpreting our rules." *Tupling v. Britton*, 411 A. 2d 349, 351 (D.C. 1980). The D.C. Court of Appeals has also

acknowledged the derivation[5] of its jurisdiction-invoking rules from the F.R.A.P. 3 and 4 by citing Federal precedent interpreting the F.R.A.P. *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001) cited foreign state cases that in turn cited Federal precedent[6] and granted jurisdiction to a petitioner despite failure to comply with D.C. App. R. 15(a) requiring counsel to sign a corporation's Petition for Review. *See also Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (1990), citing Federal case law[7] and holding that absence of a filing fee and the requisite number

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5. Other state courts of last resort have derived their jurisdiction-invoking rules from F.R.A.P. 3 and 4 and applied this Court's precedents to resolve notice of appeal controversies *See, e.g., Cain v. State of Georgia,* 275 Ga. 785, 573 S.E. 2d 47 (Ga. 2000)(invocation of jurisdiction allowed because intent was clear, despite apparent untimeliness of cross-appeal); *In Re Appeal of Shantee Point Inc.*, 811 A. 2d 1253 (Vt. 2002)(functional equivalent doctrine used to deem timely a cross-appeal filed after first appellant had filed and then withdrawn an ambiguous notice of appeal); *Thigpen v. State of Alabama*, 825 So. 2d 244 (Ala. 2001)(Ala. R. App. 4(a) derived from F.R.A.P. and permitted use of *Houston v. Lack*, 487 U.S. 266 (1988), "inmate mailbox" rule to deem a prisoner's notice of appeal timely).

6. Boydston v. Strole Develop. Co., 193 AZ 247, 969 P. 2d 653, 656 (1998)(en banc), citing *K.M.A. Inc. v. General Motors Acceptance Corp.*, 652 F. 2d 398 (5th Cir. 1981)(corporation granted 30 days to enter appearance of counsel before its appeal dismissed).

7. Parissi v. Telechron, Inc., 349 U.S. 46 (1955), holding that timely notice of appeal was not rendered invalid by lack of the filing fee required by statute.

of copies of Notice of Appeal was not a jurisdictional defect. The Notice of Appeal in *Montgomery* was deemed timely even though it was initially rejected by the Clerk and not refiled with the filing fee and mandatory copies until after the 30 day appeal period expired. *See also In Re J.W.*, 763 A. 2d 1129, 1131 (D.C. 2000), citing to F.R.A.P. precedents from the Ninth and Eleventh circuits and holding that in a juvenile criminal matter, the prosecutor's failure to file a mandatory Certificate on a suppression issue, did not deprive the D.C. Court of Appeals of appeal jurisdiction because the notice of appeal was timely filed and signaled the appellant's intent to appeal.

CONCLUSION

For the foregoing reasons, this Court's Rule 10(b) and Rule 10(c) supervisory authority over application of the Federal Rules of Appellate Procedure[8] should be exercised in this case and the writ of certiorari to the District of Columbia Court of Appeals should be allowed.

Respectfully submitted,

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8. Last term, this Court allowed *certiorari* in another case raising questions of appeal-intent in a cross-appeal under F.R.A.P. 3 and 4, *Zapata Industries v. W.R. Grace & Co., cert. granted,* 123 S. Ct. 31 (2002), but *certiorari* was later denied after Sup. Ct. R. 46.1 dismissal of the case by the parties. 123 S. Ct. 551 (2002).

D.C. Code § 11-743

The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules.

D.C. Court of Appeals

Rule 3. Appeal as of right – How taken.

(a) *Filing the notice of appeal.* An appeal permitted by law as of right from the Superior Court, including an expedited appeal, shall be taken by filing a notice of appeal with the Clerk of the Superior Court within the time allowed by Rule 4. Eight copies of the notice shall be filed. Form 1 is a suggested form of a notice of appeal, but the use of a particular form shall not be required. The notice of appeal shall specify the party of parties taking the appeal and shall designate the judgment, order, or part thereof from which appeal is taken. Filing may be accomplished by mail addressed to the Clerk of the Superior Court; but filing shall not be deemed timely unless the notice is, in fact, received by that Clerk within the prescribed time. If a timely notice of appeal is filed by a party, any other party to the proceeding in the Superior Court may file a notice of appeal within the time prescribed by Rule 4. The notice of appeal shall be signed by the individual appellant or by counsel for appellant. If the appellant is a corporation or other entity, the notice shall be signed by counsel.

Rule 4. Appeal as of right – When taken.

(a) *Civil cases.* (1) Notice of appeal. A notice of appeal in a civil case shall be filed with the Clerk of the Superior Court within thirty days after entry of the judgment or order from which the appeal is taken unless a different time is specified by the provisions of the District of Columbia Code. If a timely notice of appeal is filed by a party, any other party to the proceeding in the Superior Court may file a notice of appeal within fourteen days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by

this paragraph, whichever period last expires. If a notice of appeal is submitted to this court, the clerk shall note thereon the date of receipt and transmit the notice to the Clerk of the Superior Court. The notice shall be deemed filed in the Superior Court on the date so noted.

(2) Termination of time for filing notice of appeal. The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing, pursuant to the rules of the Superior Court, of any of the following motions: For judgment notwithstanding the verdict; to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; to vacate, alter or amend the order of judgment; for new trial; for reconsideration if authorized by the rules of the Superior Court; and any other motion seeking relief in the nature of the foregoing.

Rule 3. Appeal as of Right–How Taken

(a) Filing the Notice of Appeal. (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case. (1) *Time for Filing a Notice of Appeal.* (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.* (A) If a party

timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

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(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

v.

PIPER, MARBURY, RUDNICK, WOLFE, LLP, et al.,
Defendants

Civil Action No.00-5875

MEMORANDUM OPINION AND ORDER

Before the Court are the motion of defendant, Jackson & Campbell, P.C., for summary judgment, the renewed motion of defendant, Jackson & Campbell, P.C., for summary judgment, plaintiff's opposition, the reply of defendant, and plaintiff's supplemental sworn declaration in further opposition; the motion of defendant Piper, Marbury, Rudnick & Wolfe, LLP, for summary judgment on the issue of proximate cause; the motion of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, for summary judgment for plaintiff's failure to prove negligence; the motion of defendant, Norman H. Singer, for summary judgment; the supplement of defendant, Singer & Associates, P.C., to its motion, infra, for summary judgment and defendant John Craig's joinder to defendants, pending motions for summary judgment; plaintiff's opposition to defendants, various motions for summary judgment, and all defendants' consolidated reply in further support of their motions for summary judgment filed in December of 2001; the motion of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, to adopt motions for summary judgment filed by co-defendants; plaintiff's motion for summary judgment, the opposition of defendants, and plaintiff's supplement to its motion for summary judgment on

collateral estoppel and 1996 compensation issues.[1]

Also before the Court are the motion of defendant John M. Craig to dismiss for lack of personal jurisdiction, plaintiff's opposition, and defendant's reply; the motion of defendant Norman H. Singer to dismiss for lack of personal jurisdiction and to. quash service of process, plaintiff's opposition, and plaintiff's supplemental exhibit in opposition; the motion of defendant Norman H. Singer to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction and for failure to state a claim and the opposition of defendant Jackson & Campbell, P.C.; and the motion of defendant Singer & Associates, P.C., for summary judgment, plaintiff's opposition, and defendant's reply.

In this malpractice action arising out of legal services supplied to plaintiff in the course of litigation conducted in Virginia state and federal courts during 1998 and 1999 both sides now move for entry of judgment as a matter of law in their favor.

The main contours of what happened when plaintiff's owner, Tamara Ann Dyer, and her husband, James Donald Dyer, engaged defendant Norman Singer to pursue a civil action against Xerox Corporation in connection with termination by Xerox of a distribution agreement with plaintiff are not fundamentally disputed. Rather, the parties dispute whether each of the defendants entered into a relationship with plaintiff as its attorney, and whether each of the defendants was functioning as plaintiff's attorney at the time the alleged malpractice occurred. The parties also dispute whether defendants, properly pleaded and promoted plaintiff's unsuccessful civil action and, in particular, whether defendants

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1. Following the hearing of pending motions on April 3, 2002, plaintiff submitted to the Court plaintiff's supplemental authority no. 2 on alleged Virginia law deficiency in expert Pressman's qualifications and on collateral estoppel issues. Defendants thereafter filed their motion to strike plaintiff's post-hearing submission.

may have neglected to make offensive use of collateral estoppel against Xerox in the Virginia litigation. Last, the parties quarrel about whether plaintiff has proffered such expert testimony as would be necessary to establish substandard professional performance in the Virginia litigation.[2]

Plaintiff, Words, Inc., began as a word processing service in 1973 in Alexandria, Virginia. In 1992 Words, Inc. , became a sales agent for Xerox Corporation. Until 1996 Words, Inc., and Xerox relied on an annual contract prepared by Xerox to govern their relationship during each calendar year. In 1997, however, Xerox, by letter of July 27, announced it would review its annual agency agreement with plaintiff. Ultimately, Xerox declined to renew its agreement. Deprived of its contractual arrangement with Xerox, plaintiff became insolvent and by 1998 had ended active operation.

Plaintiff now protests, principally, that Section 4.1 of the 1997 contract repudiated by Xerox provided for a year's renewal by reciting that "[for] Agents who covered substantially the same territory under a prior Xerox Authorized Sales Agent Agreement, this Agreement shall be effective as of the earlier of the date of execution or January 1, 1997," and that disputes about breach or termination of the Agreement were to be governed by New York law. Even though the United States Court of Appeals for the Fourth Circuit ultimately determined in Words, Inc. v. Xerox 205 F.3d 1336 (2000), that New York law required both plaintiff and Xerox to have signed the 1997 Agreement to make it enforceable, plaintiff contends that if defendants had advanced the preclusive precedent of McCune V. Xerox, 225 F.3d 654 (2000) a generally contemporaneous, cognate action brought in the United States

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2. Defendants John M. Craig and Norman H. Singer have also moved to dismiss the claim for lack of personal jurisdiction. Defendant Singer has likewise moved to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction.

District' Court for the District of West Virginia and later affirmed by the Fourth Circuit, plaintiff would have prevailed both in the trial court and on appeal.[3]

To pursue its claims against Xerox on account of Xerox's failure to renew the agency agreement', plaintiff, on February 4, 1998, engaged the professional services of defendant Singer and defendant Piper, Marbury, Rudnick & Wolfe, L.L.P.[4] On August 8, 1998, Mr. Singer who, on July 13, 1998, had left the firm of Rudnick, Wolfe, Epstein & Zeidman, see n.3, infra, instituted litigation on behalf of plaintiff and against Xerox in the Circuit Court for the City of Alexandria, Virginia.[5] On September 8, 1998, Xerox Corporation removed plaintiff's case to the United States District Court for the Eastern District of Virginia and on September 15 moved to dismiss the complaint in the removed action. At about the same time in September of 1998, defendant Singer became general counsel

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3. Plaintiff, as noted, supra, makes a variety of other arguments about the extent of defendants, malpractice and of different defendants, liability for what happened in the Virginia courts. Plaintiff also contends that its showing of what constitutes malpractice in the Eastern District of Virginia satisfies the evidentiary requirements for warding off dispositive motions challenging actions alleging deficient performance by lawyers. The substance of plaintiff's submission at this juncture, however, rests on its insistence that the vital significance of offensive collateral estopple was ignored or misapprehended by defendants and that its proffered expert would supply the necessary constituents of legal malpractice in Virginia.

4. In 1999 Mr. Singer's firm, Rudnick, Wolfe, Epstein & Zeidrnan merged with Piper & Marbury in the District of Columbia and became Piper Marbury Rudnick & Wolfe, L.L.P.

5. Earlier, on March 14, 1997, McCune v. Xerox had been brought in the federal trial court in West Virginia.

to a corporation in Bethesda, Maryland, and of counsel with defendant Jackson &: Campbell, P.C. Meanwhile, from September 22 to September 30, McCune v. Xerox, supra, was being tried in the United Sates District Court in West Virginia.

By letter of October 13 defendant Singer advised Mr. and Mrs. Dyer that he had become "Counsel to Jackson &: Campbell, P.C.," that he "would like to refer the Words case to J & C because they are better equipped to pay full time and attention to it," and that J & C will be reviewing the case to see if they are agreeable to taking it and if so, will comply with the Rudnick fee agreement, but with one exception. Somehow, some way you will have to come up with about a $10,000 retainer." Statement of material facts as to which there is no genuine dispute in support of the renewed motion for summary judgment of defendant Jackson & Campbell, P.C., exhibit 2 at 1.

On October 16, 1998, the Eastern District granted Xerox's motion and dismissed the complaint of Words, Inc. On November 6 Mr. Singer filed an amended complaint which, however, the Eastern District dismissed on January 8, 1999, with prejudice to it resubmission. Thereafter, following appellate oral argument at which Mr. Singer neglected to appear on behalf of plaintiff, the Fourth Circuit affirmed dismissal of plaintiff's complaint by the District Court. Words, Inc, v. Xerox Corp., supra. Subsequently, on August 8, 2000, plaintiff filed its complaint in this Court.

Defendant Jackson & Campbell, P.C. argues convincingly that no agreement, nor any affirmative conduct, established a professional relationship between plaintiff and Jackson & Campbell, P.C. Although Mr. Singer had been designated as "of counsel" to the firm, his status was as an independent contractor, not as a partner or employee, and Jackson Campbell reserved the right "'to accept or reject any matter referred to it." Letter of September 17, 1998, to Norman H. Singer, Esq., from James P. Schaller, President, renewed motion for summary judgment of defendant, Jackson &

Campbell, P.C., exhibit 1, ¶ 2. Plaintiff, moreover, was plainly apprised that the litigation Mr. Singer was pursuing for plaintiff would have to be reviewed for acceptance by Jackson & Campbell and would require plaintiff's supplying Jackson & Campbell with ten thousand dollars as a retainer. Letter of October 13, 1998, from Norman H. Singer to Mr. and Mrs. James Donald Dyer at 1, renewed motion for summary judgment of defendant, Jackson & Campbell, P.C., exhibit 2 at 1. Significantly, Mr. & Mrs. Dyer never paid such retainer, as Mrs. Dyer has conceded despite her uncertainty and her supposition that the issue had been somehow resolved: I really didn't know what was happening with that. I thought I -- just figured everybody has got it worked out somehow because they have forgotten about that or I never heard about it anymore and things went on and signing it for the firm; and it was, you know, about Words." Deposition of Tamara Ann Dyer of July 19, 2001, at 353-54, renewed motion, supra, exhibit 3 at 4.

Accordingly, while Mrs. Dyer may have been puzzled, no conferral of apparent authority on Mr. Singer resulted from "statements, conduct, lack of ordinary care, or other manifestations of the principal's consent whereby a third person [would be) justified in believing that the agent [was] acting within his authority." Homa v. Friendly Mobile Manor, Inc., 93 Md. 337, 363, 612 A.2d 322, 334-35 (Md. App. 1992). Mr. Singer's unmistakeable letter of October 13, 1998, to Mr. and Mrs. Dyer would have precluded any assumption of apparent authority by them, or by any reasonable recipient of Mr. Singer's letter, even if Mr. Singer had thereafter continued to use Jackson & Campbell stationery.

Finally, because Jackson & Campbell never ratified Mr. Singer's representation of plaintiff as if it were representation by the firm, and because no liability attaches to conduct by Jackson & Campbell in the absence of Jackson Campbell's acting as plaintiff's attorney, see, Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. 1983), plaintiff's causes of action against defendant Jackson & Campbell cannot survive the law

firm's dispositive motion.

Similarly, because plaintiff had severed all connection with Piper, Marbury, Rudnick & Wolfe by the time the amended complaint was filed in the Eastern District, viz., on November 6, 1998, and also by the time McCune v. Xerox, supra, was being tried, viz., during the last week of September of 1998, plaintiff cannot hold Piper, Marbury, Rudnick & Wolfe responsible in tort for its damages. Piper, Marbury, Rudnick & Wolfe concedes, of course, that plaintiff had engaged its services, along with those of Mr. Singer, on February 4, 1998. Six months later, however, on July 13, Mr. Singer concluded his professional relationship with Piper, Marbury, Rudnick & Wolfe. Not till August 8, however, did Singer initiate plaintiff's first action in the Alexandria Circuit Court. Moreover, on July 28, shortly after Mr. Singer had left Piper, Marbury, Rudnick & Wolfe, Mrs. Dyer, in a writing directed to the firm, "authorize [d] and divert [ed] the release of all [her] client files and other papers to Norman H. Singer, Esq." Memorandum in support of Piper, Marbury, Rudnick & Wolfe, L.L.P.'s motion for summary judgment -- proximate cause, exhibit B at 1. No act material or significant to this action occurred while Piper, Marbury, Rudnick & Wolfe was engaged as plaintiff's counsel: not the initiation of litigation, not the filing of the pivotal amended complaint, and not the trial in McCune v. Xerox. Even if "Mr. Singer had prepared draft motions for judgment and had investigated the case" while associated with Piper, Marbury, Rudnick & Wolfe, memorandum in support of Piper, Marbury, Rudnick & Wolfe, L.L.P.'s motion, supra, at 12, none of the acts underlying this cause of action in malpractice had occurred at such time or in such a fashion as to implicate Piper, Marbury, Rudnick & Wolfe or to render it liable to plaintiff. Action taken (or ignored) by Mr. Singer while plaintiff's state claim remained in gestation cannot, under the circumstances here alleged, fairly be deemed to be in any substantial way connected with or determinative of the outcome of plaintiff's cause of action in the Eastern District or the Fourth Circuit so

as to impose liability on Mr. Singer's firm. Nothing, in fine, has been proffered by plaintiff to establish wrongful or substandard professional conduct by Piper, Marbury, Rudnick & Wolfe. Mere representation of plaintiff by the defendant firm at a time leading up to initiation of the state litigation cannot by itself constitute malpractice as the decisional law has recognized that "[legal] malpractice is not a distinct cause of action for statute of limitations purposes, but instead depends upon the underlying acts. See, Canterbury v. Spence, 150 U.S. App. D.C. 263, 284, 464 F.2d 772, 793, cert. denied, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 418 (1972) Saunders v. Nemati, 580 A.2d 660, 667 (D.C. 1990).

All defendants, furthermore, resist plaintiff's contention that "Singer should have argued that the McCune jury's conclusion that a contract was formed between McCune and Xerox based upon paragraph 4.1 precluded Xerox from denying that a contract had been formed with Words." memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 29 (footnote omitted). Plaintiff has insisted, however, that "[t]he standard of care required defendants to assert the October, 1998 McCune judgment collaterally against defendant Xerox, which would have compelled a minimum $450,000 contract and fraud damages judgment against Xerox Corp. and warranted substantial attorney's fees be paid by Xerox also." Plaintiff's point's and authorities in support of motion for summary judgment at 14. Plaintiff relies on its "expert witness on franchise-dealer litigation, Arthur Pressman, of the Philadelphia Bar," plaintiff's points and authorities, supra, at 14, and emphasizes that defendants ought to have monitored the McCune proceedings more closely as "[t]he contract formation issue in the McCune case and Words, Inc. case were exactly identical, as were the operative contract documents and regional officers of the Xerox Corporation who implemented the unlawful withdrawal of the 1997 contracts upon both McCune and Words, Inc." Plaintiff's points and authorities, supra, at 15. What defeats plaintiff's contentions, however, is that two theories

sustaining recovery in contract were presented to the jury in McCune v. Xerox, but only one verdict was returned on that claim. Because the McCune jury's determination does not reveal whether the jury found for McCune on the basis of his partial performance or on the basis of the Xerox contract's requiring only McCune's signature, see plaintiff's statement of material facts not in genuine dispute, exhibit 3, the McCune verdict cannot be urged by plaintiff as constituting collateral estoppel. Regardless of whether the Eastern District and Fourth Circuit would have applied federal law or state law be it Virginia's or New York's -- to determine application of the doctrine of collateral estoppel (and the role of mutuality), the doctrine would here have had no application as "the issue sought to be precluded must have actually been determined in the prior proceeding." Sedlack v. Braswell Services Group, Inc., 12 134 F. 3d 219, 224 (4 th Cir. 1998). "Given the jury's general verdict in the [earlier] case, it is impossible to discern whether the damages awarded were based on the [partial performance] theory or on breach of contract arising from [the sufficiency of plaintiff's signature alone]. Because of the existence of alternative bases of liability, it cannot be shown that [either theory of liability] was necessary and essential to the judgment." C.B. Marchant Co., Inc. v. Eastern Foods, Inc., 756 F.2d 317, 319 (4th Cir. 1985).[6] See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).[7]

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6. Plaintiff's expert, moreover, appears to concede that no exegesis of the McCune verdict can reveal the basis of the jury's decision favoring plaintiff. See memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 29-30.

7. Plaintiff's recourse to Nimetz v. Cappadona, 596 A.2d 603 (D.C. 1991) is unavailing as that case, which addressed the obligation of a losing defendant to identify by special verdict a factually unsupported verdict when appealing from a general verdict properly supported by fact under another

More generally, plaintiff has supplied no expert evidence to demonstrate that in any challenged respect defendants breached the standard of care required to be observed by attorneys practicing in Virginia.[8] To establish legal malpractice plaintiff would have to introduce expert testimony about what standard of care a lawyer should have observed and what effect a lawyer's failure to meet such standard had on causing a client's loss. E.g., Lyle, Siecrel, Croshaw & Beale, P.C.V. Tidewater Capital Corp., 249 Va. 426, 433, 457 S.E. 2d 28, 33 (1995); Heyward & Lee Construction Co., Inc. v. Sands, Anderson, Marks & Nutter, 249 Va. 54, 57, 533 S.E. 2d 270, 272 (1995). Although plaintiff has alleged an array of violations of the standard of care by defendants, and has, in deposition testimony taken from its expert, identified approximately ten instances of breach, plaintiff's designated expert has not been shown to be qualified to express an expert's opinion about why the ten cited instances constitute

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theory of recovery, is simply not here ad rem. The reach and purpose of Nimetz v. Cappadona, supra, do not extend to issues of estoppel raised in this litigation

8. The Court has considered the four recognized factors which determine governmental interest in this dispute and has concluded that Virginia law ought here to be applied. E.Q., District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995). The events, including the claimed injuries, all occurred in Virginia, complaint, IT I and'2, and passim, the futile litigation which assertedly caused plaintiff's losses took place in Virginia state and federal courts, complaint, IT 15-20, 24, 30-31, 33-35, 37, 39-41, 50, plaintiff is a Virginia corporation with its principal place of business in Alexandria, Virginia, complaint, 1 1, and the professional relationship here in issue was centered as much, if not more, in the state and federal courts in Virginia, than at defendants, law offices in Maryland and the District of Columbia, or in the proceedings in the United States District Court in West Virginia.

malpractice as revealing breach of a Virginia lawyer's obligations to his client. In addition, most of the cited instances are otherwise not viable.

Defendants have convincingly explained why, in light of Bly v. Rhoads, 210 Va. 645, 222 S.E. 2d 783 (1976) and Virginia Code § 8.01-581.2, the standard for legal malpractice in Virginia ought to be deemed to be the same standard as that applied in medical malpractice actions. Memorandum in support of defendant Piper, Marbury, Rudnick & Wolfe, LLP's motion for summary judgment for failure to prove negligence at 2-7. Accordingly, because in legal malpractice actions "the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth [of Virginia]" Virginia Code § 8.01-581.2, the same localized standard must here apply. While plaintiff's expert appears to have acquired considerable forensic experience and acceptance elsewhere, he cannot be received as an expert in the practice of law in Virginia. Mr. Pressman, first of all, has not been admitted to membership in the Virginia bar. He is, moreover, unfamiliar with the standard of care applicable to trial lawyers in Alexandria, Virginia. Nor does Mr. Pressman know about Virginia statutory provisions for filing motions for judgment. He has, besides, conducted no research on the Virginia standard of care respecting the investigation of prospective litigation for clients. Mr. Pressman has appeared in Virginia courts but twice in his career. One occasion was very long ago and then, as well as later, Mr. Pressman was accompanied by local counsel. Deposition of Arthur L. Pressman of October 14, 2001 at 25-26. Mr. Pressman, could not, accordingly, be accepted as an expert for plaintiff as he could not render an opinion as to what standard of care is required in Virginia. Deprived of a necessary underpinning, plaintiff's tort action against the defendants cannot stand.[9] E.g., Musa v. Continental Insurance

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9. Summary judgment is properly entered "after adequate time for discovery and upon motion, against a party who

Co., 644 A.2d 999, 1001-02 (D.C. 1994).

Additionally, any initial deficiencies in defendants, professional performance were mooted by submission of the amended complaint on November 6, 1998. Plaintiff's expert would evidently agree, Pressman deposition, supra, at 216-222, and his concurrence, along with the timing of the amended pleading, deprives plaintiff of claims based on contentions that defendant Singer wrongly allowed defendant, John M. Craig, to assist in representing plaintiff, wrongly neglected to utilize the resources of Piper, Marbury, Rudnick & Wolfe, LLP, after urging plaintiff to engage that firm, and wrongly denied plaintiff an opportunity to remain as the client of Piper, Marbury, Rudnick Wolfe, LLP, after Singer had left that firm. Such asserted breaches of care, which precede the amended complaint, are pro tanto unavailable to plaintiff as grounds of recovery.

Similarly, plaintiff advances no evidentiary support for its claim that billing errors or discrepancies as to the retainer amount (vis-&-vis extraneous matters and rates not agreed to) amounted to breach of the standard of care or harmed plaintiff's cause against Xerox, Mr. Pressman, again, would agree and would concede that the retainer would, in any event, have been exhausted by legal services properly provided. Pressman deposition, supra, at 77-78 and 80-85. Neither did defendant's inexplicable failure to appear for argument before

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fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Otherwise stated, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However the nonmoving party is "entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 198 (D.C. 1991).

the Fourth Circuit furnish, without more, support for plaintiff's claim of malpractice. Nothing supplied by plaintiff indicates that the appellate court's decision would have been otherwise had Mr. Singer appeared and Mr. Pressman, in particular, would not disagree. Pressman deposition, supra, at 338. Nor has plaintiff advanced factual support for its contention that it was not afforded opportunity to stay as the client of defendant Piper, Marbury, Rudnick, & Wolfe, LLP, when defendant Singer dissolved his association with the firm. To the contrary, moreover, shortly after Mr. Singer's announcement of his intention to leave Piper, Marbury, Rudnick & Wolfe, LLP, Mrs. Dyer affirmed, "of course we want to transfer with you." Letter of August 2, 1998 from Tammy A. Dyer to Norman H. Singer at 1, memorandum of law in support of Norman H. Singer's motion for summary judgment, exhibit K. Although plaintiff also attributes actionable significance to defendants' neglecting to file a motion for relief under Federal Rule 60(b) of Civil Procedure, it proffers no evidence, expert or aliunde, to substantiate its claim.

Nor can failure to rely on asserted admissions by Franklin Edmonds, a Xerox agent who testified in the McCune case, be cited as evidence of malpractice. Urging that Mr. Edmonds had admitted at trial that only the signature of a Xerox agent was needed to bind Xerox to the 1997 Agreement, Mr. Pressman would argue. that defendant Singer committed malpractice when he failed to advance "Edwards' trial testimony in either the argument on the amended complaint or Fourth Circuit brief." Pressman deposition, supra, at 46. Yet careful review of the relevant deposition and trial testimony adduced from Edwards in McCune, Supra, reveals that the witness made no admissions beyond conceding the literal wording of the contract. Memorandum of law in support of defendant Norman H. Singer's motion for summary judgment at 34-37. No matter how construed, Mr. Edwards' rather staccato testimony cannot reasonably be understood to constitute the concession that plaintiff here claims he made that and Mr. Pressman would rely on to claim malpractice.

Plaintiff presses the point that it would have survived Xerox's motion to dismiss the amended complaint had it "relied less on the issue of reliance and partial performance, which seems to be the subjects generally of the amended pleading and more on the language of [paragraph] 4.1 [of the 1997 Agreement], which makes a distinction between the existing dealers who had a particular territory and for [them] counter-execution by Xerox was not required." Pressman deposition, supra, at 255-256. Apart from the issue of Mr. Pressman's qualifications as an expert, supra, at 13-16, the criticism seems wholly unavailing as the Fourth Circuit reviewed the 1997 Agreement both in McCune, supra, and in words, supra, and determined that the Agreement would not be binding unless both signatures had executed it. Nothing in the appellate determinations suggests that a stronger or varying emphasis on the document in question would have led to a different appellate ruling in Words, and, as explained, supra, the McCune decision could have no preclusive effect on the case underlying this action. In short, if defendants were unable to rely on the theory of collateral estoppel -- as they were not -- failing to argue it can in no wise be construed as error or malpractice.[10] Plaintiff's last claim, in this respect, is that defendants failed to comprehend the nature of Words' arrangement with Xerox and so never understood the distinction between in-territory sales by Xerox and chargebacks, a practice which evidently could lead to refund of commissions by plaintiff to Xerox if a sale or lease of Xerox equipment were subsequently cancelled by a customer. Plaintiff's contention, however, cannot be sustained in view of the amended pleading which plainly encompasses a claim for losses arising out of chargebacks in 1996. In its amended

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10. On which of two factual bases the McCune jury decided the contract claim for McCune is impossible to decipher. Mr. Pressman would agree that he cannot interpret or reconstruct the jury's "actual analysis," Pressman deposition, supra, at 309, 332-33, and tellingly would admit that he cannot divine the basis of the jury's verdict "by virtue of the interrogatory answers." Pressman deposition, supra, at 337.

complaint plaintiff sought damages for losses which it attributed to Xerox's misconduct and breach of contract and pleaded its cause with adequate specificity at, e.g., ¶¶ 7, 22, 24, 32, and 33 of the amended complaint. Memorandum of law in support of defendant Norman H. Singer's motion for summary judgment, exhibit 16. As a matter of law the amended complaint satisfied Federal Rule 8(a) of Civil Procedure as it manifestly asserts "a short and plain statement of the claim showing that the pleader is entitled to relief." Chargebacks are encompassed within Words, Inc.'s allegation that "[d]uring 1996," Xerox deprived it of "earned commission in excess of $100,000.00," amended complaint, ¶ 22, ¶ 32, and of "certain sales commissions that occurred in 1996, id., ¶ 24, and that" [a]s a direct consequence of this breach of contract, Words has suffered substantial damages." Id, ¶ 33.[11] The second cause of action in the amended complaint asserted breach of the 1996 contract with requisite particularity. It provides no basis for a finding of legal malpractice.

In addition, plaintiff has been unable to identify evidence necessary to establish damages flowing from its 1997 breach of contract claim. Here, too, expert testimony appears to be indispensable in projecting what would have been plaintiff's lost profits. See, e.g., ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193, 520 S.E. 2d 355 (1999); Maher v. Continental Casualty Co., 76 F.3d 535 (4 th Cir. 1996). Yet Mr. Pressman would disavow any opinion as to settlement or verdict amounts in the underlying case. Pressman deposition, supra, at 211-13, memorandum of points and authorities in support of the renewed motion for summary judgment of defendant Jackson & Campbell, P.C., exhibit 10. Karen Parker, also identified by plaintiff as an expert witness, likewise claims no opinion respecting the profitability of Words, Inc., and limits her view, ie., that Words, Inc., would have experienced continued growth during 1997, to her

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11. Notably, Mr. Dyer has identified charge-backs as "the money that was owed." Dyer deposition, supra, at (page 71) 306.

personal experience and to her belief that "based off [sic] their track record there is a very good probability that [continued growth] would happen." Deposition of Karen York Parker of September 10, 2001, at 144, 145; memorandum of points and authorities in support of renewed motion for summary judgment of defendant Jackson Campbell, P.C., supra, exhibit 11. Ms. Parker, however, has no identifiable education or experience that would enable her to conduct the needed market analysis, account for variables, and forecast with reasonable reliability lost profits. While her forecast would, admittedly, be short-range, even its projection for a single year requires a foundation in expertise and in data that the witness appears not to be able to furnish. See Maher v. Continental Casualty Co., supra, ITT Hartford Group. Inc, v. Virginia Financial Associates, Inc., supra.

As to the third and fourth causes of action in the amended complaint which seeks damages for intentional misrepresentation and negligent misrepresentation, no showing, expert or otherwise, has been proffered by plaintiff in support of malpractice. In the absence of such showing, respecting either the filing of the amended complaint or the defense against Xerox's dispositive motion, the Court will enter judgment summarily in defendants, favor. Celotex Corp. v. Catrett, supra; Musa v. Continental Insurance Co., supra.

WHEREFORE, the Court, this 15th day of May, 2002,

ORDERS that the motion of defendant, Jackson & Campbell, P.C., for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that the renewed motion for summary judgment of defendant, Jackson & Campbell, P.C., be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of Jackson &: Campbell, P.C., and against plaintiff; and

FURTHER ORDERS that the motion for summary judgment proximate cause of defendant, Piper, Marbury, Rudnick & Wolfe,

LLP, be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, Piper, Marbury, Rudnick & Wolfe, LLP, and against plaintiff; and

FURTHER ORDERS that defendant Piper, Marbury, Rudnick, Wolfe, LLP's, motion for summary judgment for failure to prove negligence be, and it hereby is, denied as moot; and

FURTHER ORDERS that defendant Norman H. Singer's motion for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, Norman H. Singer, and against plaintiff; and

FURTHER ORDERS that defendant Piper, Marbury, Rudnick Wolfe, LLP's, motion to adopt motions for summary judgment filed by co-defendants be, and it hereby is, granted; and

FURTHER ORDERS that plaintiff's motion for summary judgment be, and it hereby is, denied; and

FURTHER ORDERS that the motion of all parties to continue the January 29, 2002, multi-door mediation be, and it hereby is, denied as moot; and

FURTHER ORDERS that defendant John M. Craig's motion for summary judgment by joinder be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be summarily entered in favor of defendant, John M. Craig and against plaintiff; and

FURTHER ORDERS that the motion of defendant John M. Craig to dismiss for lack of personal jurisdiction be, and it hereby is, denied as moot; and

FURTHER ORDERS that the motion of defendant Norman H. Singer to dismiss for lack of personal jurisdiction and to quash

service of process be, and it hereby is, denied as moot; and

FURTHER ORDERS that the cross-claim of defendant Jackson Campbell, P.C., against defendant, Norman H. Singer be, and it hereby is, dismissed as moot; and

FURTHER ORDERS that the motion of defendant Norman H. Singer to dismiss the cross-claim of defendant Jackson & Campbell, P.C., for lack of personal jurisdiction and for failure to state a claim be, and it hereby is, denied as moot; and

FURTHER ORDERS that the motion of defendant Singer Associates, P.C., for summary judgment be, and it hereby is, granted; and

FURTHER ORDERS that judgment as a matter of law be entered summarily in favor of defendant, Singer & Associates, P.C., and against plaintiff; and

FURTHER ORDERS that defendants' motion to strike plaintiff's post hearing submission be, and it hereby is, denied.

John H. Bayly, Jr.
Judge

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

CIV. NO. 00-05875

V.

PIPER MARBURY RUDNICK WOLFE, NORMAN SINGER, ET AL.
Defendants

PLAINTIFF'S RULE 59(e) MOTION TO ALTER AND AMEND JUDGMENT AND TO CORRECT SUMMARY JUDGMENT RECORD PURSUANT TO RULE 60(a)

Pursuant to Rule 59(e), plaintiff moves the Court to both alter and amend the May 15, 2002 Order granting summary judgment to defendants and to permit supplementation of the record as follows. This Motion does not require securing consent from opposing parties.

1. Plaintiff respectfully requests the Court, Judge John H. Bayly, Jr., to document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.. These apparent ex parte communications occurred in August 2001 and March 2002. Plaintiff's counsel is not presently suggesting that any such ex parte communications implicate Judicial Code of Conduct Cannon 3(B)(7) or Superior Court Rule 63-I. Plaintiff's counsel cannot, however, turn away his *client's* demand that these apparent ex parte communications be documented for the record.

2. The 1996 compensation issue may well be appealed and

requires a record clarification. Rule 60(a) permits corrections of the record for appeal purposes where the record is presently incomplete owing to oversight or omission. See also D.C. Court of Appeals Rule 10(e) as to initiating modification or correction of the record at the trial court level. There is good cause for a record clarification. Plaintiff's Motion for Summary Judgment Exhibit 18 was a ten page-excerpt of an (August 2001) 135-page compilation "Itemization" spreadsheet of 1996 compensation allegedly owed Words, Inc. by Xerox Corporation but not sufficiently litigated for by the defendant attorneys then representing Words, Inc.. The 135-page Itemization uses a first column reference to "Page Number," which refers to and incorporates specified parts of an over 1,500 page set of monthly Sales Agent Summary Reports and Incentive Compensation Summaries provided by Xerox Corporation to Words, Inc. in 1996. The Itemization package was created in August 2001 and served on all the present defendants.

The bulky Sales Agent Summary Reports and Incentive Compensation Reports for 1996 were reviewed by the defendant attorneys representing Words, Inc. in 1998, and were made also available by plaintiff in this current litigation for inspection and copying to the negligence defendants in 2001. Only defendant Piper Rudnick and third-party defendant James Brincefield, however, copied these voluminous documents. Present counsel for defendant Norman Singer, William Ryan and Howard Feldman of Whiteford, Taylor, and Preston, entered the case well after the Sales Agent Summary Reports and Incentive Compensation Summaries were made available for inspection and copying.

On appeal, Plaintiff deserves the right to make meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to the defendants and are referenced in and incorporated by present record documents. The purpose of Rule 60(a) is to promote a fair appeal on a complete record, and this purpose is accordingly served by

designation now of the complete, 135-page Itemization as part of the record in this case, along with the voluminous supporting Sales Agent Summary Reports and Incentive Compensation Summaries in 1996 monthly formats. Pursuant to D.C. Court of Appeals Rule 11(b), plaintiff will propose that just one set of these bulky record documents be provided to the Court of Appeals during record transmittal. A complete copy of the 135-page (August 2001) Itemization and the supporting (1996) monthly Sales Agent Summary Reports and Incentive Compensation Summaries has been delivered to Chambers this day. A proposed Order noting this correction of the record is attached.

Respectfully submitted,

John S. Lopatto III, D.C. Bar 965426; VSB #33980
1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202
202-861-5800
Attorney for Plaintiff

[Certificate of Service and Filing: May 30, 2002]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
PLAINTIFF

CIV. NO. 00-05875

V.

PIPER MARBURY RUDNICK WOLFE, NORMAN SINGER, ET AL.
DEFENDANTS

[PROPOSED]
ORDER CORRECTING RECORD FOR APPEAL

Having considered the Plaintiff's Rule 59(e) and Rule 60(a) motion to correct and supplement the record with respect to certain documents excerpted and referred to in the present summary judgment exhibits, and considering any opposition by defendants thereto, and noting the authority for record clarification expressed by the District of Columbia Court of Appeals in its Rule 10(e), the Court hereby **ORDERS** that plaintiff's motion for record correction is granted as follows:

1. The (August 2001 prepared) 135 page "Words, Incorporated 1996 and January 1997 Itemization of Revenue, Chargebacks and Commissions recorded by Xerox Corporation and Compensation Claimed by Words, Incorporated Against Xerox Corporation", excerpts of which were contained in Plaintiff's Motion for Summary Judgment Exhibit No. 18, is deemed part of the record;

2. The 1996, monthly Sales Agent Summary Reports and Incentive Compensation Summaries supplied by Xerox Corporation to Words, Incorporated, and referred to in Plaintiff's Motion for Summary Judgment Exhibit No. 18, is deemed part of the record.

3. These two sets of additional record material have been provided to chambers in a large moving box, with appropriate caption and labels. This exhibit box shall be delivered to the Clerk for transmittal to the Court of Appeals should any appeal be undertaken.

So Ordered:

_____

Judge John H. Bayly, Jr.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INCORPORATED,
Plaintiff

CIV. NO. 00-CA-05875

V.

PIPER RUDNICK, NORMAN SINGER, ET AL.,
Defendants

PLAINTIFF'S RULE 41(A)(1)(I) NOTICE OF VOLUNTARY DISMISSAL OF FIRST AMENDED COMPLAINT COUNT 2 AND COUNT 3

Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint. Plaintiff's Motion for Leave to File a First

Amended Complaint adding[12] Count 2 and Count 3, is pending and should now be considered moot. This voluntary dismissal of the First Amended Complaint and the two new counts pleaded therein, is made before any defendant has filed an Answer or motion for summary judgment with respect to the new counts 2 and 3 in the First Amended Complaint. Rule 41(a)(1)(i).

Pursuant to Rule 41(a), this voluntary dismissal of Counts 2 and 3 in the First Amended Complaint is without prejudice. Plaintiff may move to re-file the First Amended Complaint with Counts 2 and 3 should any remand of Count 1 occur after appeal.

Respectfully submitted,

John S. Lopatto III, D.C. Bar 965426; VSB #33980
1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202
202-861-5800
Attorney for Plaintiff

[Certificate of Service and Filing: May 30, 2002]

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14. The First Amended Complaint repleads Count 1 from the Original Complaint verbatim. Judge Bayly's May 15, 2002 summary judgment rulings apply to this Count 1 of the original Complaint.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Words, Inc.
v.
Piper, Marbury, Rudnick & Wolfe, L.L.P, Norman Singer, et al.

Civil Action No. 00-5875

ORDER

Before the Court are plaintiff's motion under Superior Court Rule 59(e) of Civil Procedure to alter and amend the judgment and under Superior Court Rule 60(a) of Civil Procedure to correct the record underlying summary judgment, the response and opposition of defendant, Jackson & Campbell, P.C., and the oppositions of defendants, Norman H. Singer, Piper, Marbury, Rudnick & Wolfe, L.L.P., and Singer Associates, P.C.

Also before the Court is a bill of costs submitted by defendant, Jackson & Campbell, P.C., and plaintiff's opposition; a bill of costs submitted by defendant, Norman H. Singer, and plaintiff's opposition; and a bill of costs submitted by defendant, Piper, Marbury, Rudnick & Wolfe, L.L.P., and plaintiff's opposition.

In its motion to alter or amend the judgment and to correct the record, plaintiff seeks to supplement the record by designating as part of the record both a "135-page compilation 'Itemization' spreadsheet of 1996 compensation allegedly owed Words, Inc. by Xerox Corporation but not sufficiently litigated for by the defendant's attorneys then representing Words, Inc.", plaintiff's Rule 59(e) motion to alter and amend judgment and to correct summary judgment record pursuant to Rule 60(a) at 2, and also "an over 1,500 page set of monthly Sales Agent Summary Reports and Incentive

Compensation Summaries provided by Xerox Corporation to Words, Inc., in 1996." Plaintiff's motion, supra, at 2.[13] Plaintiff argues that the "1996 compensation issue may well be appealed and requires a record clarification." Plaintiff's motion, supra, at 2. More specifically, plaintiff contends that it "deserves the right to notice meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to defendants and are referenced in and incorporated by present record documents." Plaintiff's motion, supra, at 3.

Plaintiff also asks the undersigned judge to "document for the record the reasons for and nature of any apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C." Plaintiff's motion, supra, at 1. Plaintiff asserts that "[t]hese apparent ex parte communications occurred in August 2001 and March 2002" and while plaintiff's counsel does not now suggest that any such ex parte communications implicate Judicial Code of Conduct Canon 3(B)(7) or Superior Court Rule 63-I, plaintiff's counsel represents that plaintiff has "demand[ed] that these apparent ex parte communications be documented for the record." Plaintiff's motion, supra, at 1.

In opposition defendants, Norman H. Singer, Piper, Marbury, Rudnick & Wolfe, L.L.P., and Singer & Associates, P.C., urge that plaintiff now wrongly seeks to have the Court of Appeals "consider documents which were not before this judgment and to correct summary judgment record at 3. Defendants point out, moreover, that Rule 60(a) applies to

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13. Plaintiff has supplied chambers with a "complete copy of the 135-page (August 2001) Itemization and the supporting (1996) monthly Sales Agent Summary Report and Incentive Compensation Summaries." Plaintiff's motion, supra, at 3. Plaintiff proposes that "just one set of these bulky record documents be provided to the Court of Appeals during record transmittal." Id.

clerical mistakes of the Court and is not to be utilized to reverse, change or correct tactical decisions of a litigant." Opposition, supra, at 3. No oversight or omission, argue defendants, has here been cited by plaintiff which ought not to be permitted to advance its appeal by submitting for review documents plaintiff "deliberately determined not submit to this Court." Opposition, supra, at 4. Nor, add defendants, is plaintiff helped by District of Columbia Court of Appeals Rule 10(e) which permits modification or correction of the record so as to conform the appellate record to the trial record. Defendants cite McCoy v. United States, 781 A.2d 765 771-72 (D.C. 2001), and emphasize that "the Court of Appeals review must be limited to what was on file with this Court when it ruled on the parties' dispositive motions." Opposition, supra, at 5 (citation omitted).

When plaintiff sought summary judgment in its favor on what it claimed was an underlying "$160,000 or more damages claim [that] was squandered away by the careless lawyering of the supposedly expert defendant franchise litigation attorneys", plaintiff's points and authorities in support of motion for summary judgment at 27, plaintiff asserted that "[t]he lynchpin of Words 1996 compensation claims was set out in the 140 page Itemization provided to defendants in August 2001," and that "Expert Witness [Karen] Parker validated the methodology in this Itemization, excerpts of which [have been] attached in Exhibit 18, and which proved that Xerox was abusing the commission chargeback procedure by crediting and then reversing commissions to Words, Inc. for sales that Words made in its territories to non-Reserved Account customers." Plaintiff's points and authorities, supra, at 26. Because, plaintiff now reasons, the "1996 compensation issue may well be appealed and requires a record clarification," plaintiff's Rule 59(e) Motion, supra, at 2, "plaintiff deserves the right to make meaningful reference to these case-within-the-case backup documents to plaintiff's summary judgment exhibit 18, all of which have been amply noticed to the defendants and are referenced in and incorporated by present record documents." Plaintiff's Rule

59(e) motion, supra, at 3.

Judgment as a matter of law is to be granted a litigant "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Superior Court Rule 56(c) of Civil Procedure. Where, as here, cross-motions for summary judgment have been urged, the Court must separately consider the submission of each litigant, but is obviously to refer itself to all of the evidentiary materials on file and referred to in Rule 56. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1984). Moreover, upon appeal the Court of Appeals reviews the trial court's decision de novo. E.g., Anderson v. Ford Motor Co., 682 A.2d 651,652 (D.C. 1996). Here, then, the appellate court passes on what was before the trial court so as to determine whether facts were misapprehended or law was misapplied by the lower court. Anderson v. Ford Motor Co., supra, 682 A.2d at 652; Seigel v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 303 (D.C. 2000). Accordingly, the appellate court may also determine whether factual submissions were wrongly excluded or overlooked. See Celotex Corp. v. Catrett, supra, 477 U.S. at 323.

What this Court ought not to allow, however, is transfer of a different or expanded record to the appellate court and so skew appellate review. Neither Superior Court Rule 59(e) nor 60(a) of Civil Procedure permits the trial court to enlarge a record by subsequent inclusion of material from which a movant has purposely excerpted selected segments (comprising ten pages out of 135 pages referring to an additional 1,500 pages of reports and summaries) so as to permit validation by an expert of the methodology in the underlying documents. Plaintiff's points and authorities, supra, at 26. Experts, of course, commonly summarize their findings and are not required to submit into evidence all of their documentary calculations, references, and research. See

Federal Rule 705 of Evidence. Moreover, as a moving party, plaintiff bore "the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, supra, 477 U.S. at 323.

Because plaintiff, like Ms. Parker in forming her opinion, evidently relied on a ten-page summary in seeking summary judgment and also in opposing defendants' motion for summary judgment[14], the Court will deny plaintiff's motion to enlarge the record by including in it the 135-page document of August 2001, "Words, Incorporated 1996 and January 1997 Itemization of Revenues, Chargebacks and Commissions recorded by Xerox Corporation and Compensation Claimed by Words, Incorporated against Xerox Corporation," and the approximately 1,500 page document, collecting, for 1996, monthly "Sales Agent Summary Reports and Incentive Compensation Summaries." These underlying documents (ad instar voluminis) were not directly relied upon by plaintiff in its dispositive motion nor in its opposition to defendant's dispositive motion. Neither was their significance made known to the Court except, at a considerable remove, as supporting paperwork for plaintiff's expert's conclusions about the reasonableness of plaintiff's damages calculations.

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13. Although plaintiff opposed defendants' motion for summary judgment as to 1996 sales commissions claimed by plaintiff in reliance on commission reports and by reference to "over 1,000 pages of tax returns, sales and commission printouts, and other financial documents showing Words, Inc. 'Xerox" and 'non-Xerox' earnings from 1992 through 1997", plaintiff's opposition to defendants' December 21, 2001 motions for summary judgment at 22-23 (footnote omitted), plaintiff clearly explained in detail in Plaintiff's Motion for Summary Judgment and in consultant Karen Parker's report and deposition excerpts." Id., n. 14.

In response to plaintiff's stated concern about "apparent ex parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.," plaintiff's Rule 59(e) motion, supra, at 1, the undersigned judge represents that in August of 2001 he asked counsel for defendant, Jackson & Campbell, P.C., to help arrange for a subsequent status conference by telephone call with counsel for all of the parties. The undersigned judge requested Mr. Durbin's assistance when Mr. Durbin telephoned chambers to inquire about scheduling the telephone conference that was later conducted. Similarly, in March of 2002, the undersigned judge spoke directly by telephone with Mr. Durbin in response to a request to schedule a motions hearing and again asked Mr. Durbin to determine which of several available dates would be convenient for the parties. Neither during the two very brief conversations by telephone, nor at any other time, did the undersigned judge discuss with Mr. Durbin, or with any other counsel to the parties, the merits of the case or the substance of any issue connected with the case, whether pending or resolved. The sole purpose in speaking directly with Mr. Durbin, whom the undersigned judge has known for many years from his appearances in this Court and from his participation in professional and eleemosynary associations, was to accelerate scheduling of the telephone conference and the motion hearing.

Defendants all seek award of costs. Their applications are mostly opposed by plaintiff. Award of costs to a prevailing party under Superior Court Rule 54(d) of Civil Procedure lies within the trial court's discretion. E.g., Kleinman v. Aetna Casualty & Surety Co., 581 A.2d 1263. 1267 (D.C. 1990); Ingber v. Ross, 479 A.2d 1256, 1265 (D.C. 1984). Moreover, court fees and witness fees are those costs which are ordinarily recoverable. E.g., Robinson v. Howard University, 455 A.2d 1363, 1368-69 (D.C. 1983).

In its bill of costs, however, defendant, Jackson & Campbell, P.C., requests filing fees, costs of obtaining

business records necessary to its defense, a witness fee and service of process fee directed to Xerox Corporation, and costs of deposing plaintiff's principal and four additional deponents.

The Court will allow defendant, Jackson & Campbell, P.C., $40 for the filing fee claimed, but will deny all other requested fees and costs. The witness fee, as well as the service of process fee sought by defendant, are unaccompanied by the necessary certificate. Superior Court Rule 54-I(a) of Civil Procedure. Besides, defendant's costs of obtaining and copying business records, like costs of depositions, are not explained individually or with any particularity as to how they were necessarily incurred for preparation of defendant's case, Tally v. Varma, 689 A.2d 547, 556 (D.C. 1997) ("our case law requires that the trial court find that the deposition [and copying] was necessary for case preparation." (citations omitted)). Last, the service of process fee is also unexplained.

Defendant Norman H. Singer also seeks certain filing fees, costs of deposition transcripts and incidental costs, and copying charges. The Court will allow defendant Singer $160 in filing fees, transcript costs for James Dyer ($1,553.20), for Arthur Pressman, plaintiff's expert as to the standard of care ($1,356.31), for Karen Parker, plaintiff's expert as to damages (439.56), costs for teleconferencing of Mr. Pressman's deposition ($87.03), and costs of copying exhibits appended to defendant's motion for summary judgment ($875.70). The Court will deny defendant's other requests for transcripts as their necessity for preparation of defendant's case is not, either in the bill of costs or in defendant's prior submissions, clear or certain. The Court will also further deny defendant's copying charges as excessive, insufficiently explained, possibly resulting from redundancy, and not customary. See, e.g., Farmer v. Arabian American Oil Co., 379 U.S. 227, 275 (1964) ("the discretion...to tax costs charges should be sparingly exercised with reference to expenses not specifically allowed by statute.")

The bill of costs submitted by defendant, Piper, Marbury, Rudnick & Wolfe, L.L.P., will be disallowed except as to filing fees ($120). The remaining costs prayed for are wholly unexplained, e.g., Harris v. Sears Roebuck & Co., 695 A.2d 108 (D.C. 1997), very largely unprecedented, e.g., Tally v. Varma, supra, and clearly excessive. E.g., Farmer v. Arabian-American Oil Co., supra.

Wherefore the Court, this 30 day of August, 2002,

ORDERS that plaintiff's Rule 59(e) motion to alter and amend judgment and to correct summary judgment record pursuant to Rule 60(a) be, and it hereby is, denied; and

FURTHER ORDERS that bill of costs for defendant Jackson & Campbell, P.C., be, and it hereby is, granted and allowed in the amount of $40.00, and, in all other respects, denied; and

FURTHER ORDERS that bill of costs submitted by defendant Norman H. Singer be, and it hereby is, granted and allowed in the amount of $4,471.80; and, in all other respects, denied; and

FURTHER ORDERS that bill of costs for defendant Piper, Marbury, Rudnick & Wolfe, L.L.P., be, and it hereby is, granted and allowed in the amount of $120.00 and in all other respects, denied.

John H. Balyly, Jr.
Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 02-CV-1123

WORDS, INC., APPELLANT,
v.
NORMAN H. SINGER, *et al.*, APPELLEES.

On Motion to Dismiss Appeal from the Superior Court of the District of Columbia (CA-875-00)

(Hon. John H. Bayly, Jr., Trial Judge)

(Decided November 27, 2002)

Howard R. Feldman, *David P. Durbin*, *James P. Ulwick*, *Glenn W. D. Golding*, and *Carlos M. Recio*, were on the motion of appellees to dismiss appeal and the reply memorandum in support thereof.

John S. Lopatto III, was on appellant's opposition to the motion to dismiss.

NEBEKER, *Senior Judge*: This matter presents the question whether a post-judgment motion in Superior Court styled as a "Rule 59 (e)" motion, but seeking no relief available under that Rule, tolls the notice of appeal time period. We hold that it does not and dismiss the appeal as untimely.

Appellant, Words, Inc., filed a legal malpractice action against several firms and individuals, the appellees here. After the trial court granted appellees' motions for summary judgment on May 16, 2002, appellant filed a pleading entitled "Plaintiff's Rule 59 (e) Motion to Alter or Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60 (a)." The motion was filed within the ten-day deadline of Super. Ct. Civ. R. 59 (e). In the motion, appellant sought to have the trial record

supplemented with a statement by the trial court explaining certain ex parte communications and with materials to which the parties referred in their motions for summary judgment but that were not attached *in toto* to the motions. After the trial court denied the "Rule 59" motion on August 30, 2002, appellant filed its notice of appeal on September 27, 2002.

Appellees argue that the "Rule 59 (e)" motion was not in fact a motion to alter or amend the judgment and therefore did not toll the time for noting an appeal. For the following reasons, we grant the motion to dismiss.

A Rule 59 (e) motion is one that "seeks relief from alleged legal errors in the trial courts' judgment...." *Vincent v. Anderson*, 621 A.2d 367, 371 (D.C. 1993). Appellant's post-judgment motion asked only for supplementation of the record for the purpose of raising certain issues on appeal. It did not specify any error in the trial court's judgment, nor ask that the judgment be altered or reconsidered. "The nature of a motion is determined by the relief sought, not by its label or caption." *Wallace v. Warehouse Employees Union #730*, 482 A.2d 801, 804 (D.C. 1984). Therefore, the fact that appellant's motion was labeled a Rule 59 (e) motion is not determinative.

Only specific motions toll the time for appeal. D.C. App. R. 4 (a)(2). A motion to supplement the trial record is not among them. Appellant argues that its post-judgment motion qualifies as a tolling motion "to amend or make additional findings of fact." *Id.* The additional findings appellant relies on to so characterize its motion are the trial court's explanation of its ex parte communication with counsel for one of the defendants. Appellant's post-judgment motion asked the trial court to "document for the record the reasons for and nature of any apparent ex parte telephone communications [with defense counsel]." In the order denying appellant's motion, the trial court explained that the telephone calls to counsel were simply to facilitate arranging a status conference and a motions hearing. The

trial court's explanation of the calls is not an additional factual finding. It was not based on any assessment of factual assertions submitted by the parties. Rather, it was an explanation of the trial court's conduct. This explanation did not amend or supplement the trial court's memorandum opinion and order granting summary judgment, which further demonstrates that appellant's "Rule 59" motion was not a motion to amend judgment or make additional findings of fact.

Appellant's suggestion that any motion seeking nonministerial relief tolls the appeal time is contrary to the express language of D.C. App. R. 4 (a)(2). Moreover, appellant's reliance on our longstanding policy against piecemeal appeals is misplaced, since that policy is directed at prohibiting unnecessary interlocutory appeals, see *Medlantic Health Care group. Inc. v. Cunningham*, 755 A.2d 1032, 1033 (D.C. 2000), and is not intended to postpone the time for appealing a final judgment. "Piecemeal review, against which the rule of finality is aimed, is not as decisive a consideration after judgment as before judgment." *Crane v. Crane*, 657 A.2d 312, 316 (D.C. 1995) (quoting *Joseph F. Hughes & Co. v. United Plumbing & Heating Inc.*, 390 F.2d 629, 630 (6th Cir.1968)). The summary judgment order in this case was a final, appealable order, and the nature of appellant's post-judgment motion did not subject the order to modification.

Appellant's post-judgment motion to supplement the record was not one that tolled the appeal time; therefore, the notice of appeal filed more than four months after entry of the judgment is untimely. We lack jurisdiction to consider an appeal that is not timely filed. *Circle Liquors, Inc. v. Cohen*, 670 A.2d 381 (D.C. 1996). Accordingly, we grant appellees' motion to dismiss this appeal.

So ordered.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 02-CV-1123
WORDS, INC.,
Appellant,

CA5875-00

v.

NORMAN H. SINGER,
ET AL.,
Appellees

ORDER [February 28, 2003]

On consideration of appellant's petition for rehearing en banc, and appellant's motion to invoke appeal jurisdiction, the opposition and the reply thereto, it is

ORDERED by the merits division that the petition for rehearing and the motion to invoke appeal jurisdiction are denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 02-CV-1123
WORDS, INC.,

Appellant,

CA5875-00

v.

NORMAN H. SINGER,
ET AL.,

Appellees

ORDER [June 26, 2003]

On consideration of appellant's petition for rehearing or rehearing en banc, and appellant's letter pursuant to D.C. App. R. 28(k), it is

ORDERED by the merits division that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Supreme Court, U.S.
FILED
03 995 JAN 2 0 2004
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick Wolfe, L.L.P.; Jackson & Campbell, P.C.; Singer and Associates, P.C., and John Craig,
Respondents

SUPPLEMENTAL APPENDIX NO. 1 TO WORDS, INC. PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

John S. Lopatto III,
Counsel of Record for Petitioner
1776 K St., N.W., Suite 800
Washington, D.C. 20006-2365
(202 861-5800)

January 2004

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DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.

APPEAL NO. 02-CV-1123

V.

(D.C. Sup. Ct. Civ. 00-05875)

PIPER MARBURY RUDNICK WOLFE, L.L.P.; NORMAN SINGER; JACKSON & CAMPBELL, P.C., ET AL.,

Appellant Words, Inc.'s Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002, Rule 41(a)(1) Notice to Superior Court Stating Intent to Appeal and May 30, 2002 "Rule 59(e)" Motion, Each Providing Functional Equivalent of D.C.C.A. Rule 3(a) Notice of Appeal

In this jurisdiction dispositive motion for which appellant did not seek consent of the other parties and for which appellant expects opposition, appellant moves as follows:

Plaintiff's Rule 41(a)((1)(i) Notice of Voluntary Dismissal of First Amended Complaint Count 2 and Count 3, docketed with the Superior Court Civil Division Clerk on May 30, 2002 after service on all parties[1], states in its first

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1. A copy of this Rule 41(a) Notice document, without the May 30, 2002 Superior Court docket stamp, was brought to the Court's attention by appellees in their joint motion to dismiss asserting that Words, Inc. May 30, 2002 "Rule 59(e)" Motion did not toll the time for appeal.

sentence that "Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint."

This language in the captioned Sup. Ct. Civ. Rule 41 Notice declares Words, Inc. intent to appeal and meets all of the requirements for perfecting an appeal of Judge Bayly's May 15, 2002 summary judgment for defendants set forth in D.C. Court of Appeals Rule 3(a) and Rule 4(a)(1). No particular form for a notice of appeal is required, as long as the document reaches the Clerk before the 30 days appeal time as expired, is signed by a corporate appellant's counsel, specifies the party taking the appeal, and designates the order appealed from. D.C. Court of Appeals Rule 3(a). The Superior Court Civil Rule 41 Notice of this appellant Words, Inc. was docketed on May 30, 2002 by the Superior Court's Civil Division Clerk, Exh. 1, and fulfilled every one of these threshold requirements of D.C. Court of Appeals Rule 3(a).

Appellant Words, Inc. hereby invokes this Court's jurisdiction on the basis of this May 30, 2002 Notice document filed with the Superior Court. This May 30, 2002 Notice document is the functional equivalent of a formal D.C.C.A. Rule 3(a) Notice of Appeal, and is manifestly sufficient to invoke the appeal jurisdiction of this Court to review the May 15, 2002 final order of the trial court granting summary judgment to the legal malpractice defendants and denying summary judgment for plaintiff.[2] It

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2. This Motion to invoke the appeal jurisdiction of this Court on the basis of the May 30, 2002 Rule 41 motion

is also proper for Words, Inc. to invoke appeal jurisdiction in this fashion and at this stage of the appeal. *See Circle Liquors Inc. v. Cohen*, 670 A. 2d 381, 385 (D.C. App. 1996)(Court *sua sponte* raised jurisdictional issues after oral argument on merits; Court also *sua sponte* examined record to determine if offer of Remittitur filed by appellant with trial court within seven days after verdict could be considered an appeal tolling motion under D.C. App R. 4(a)(1); issue of whether the Remittitur stated intent to appeal was not asserted by appellant or considered by Court.)

Argument

1. **The D.C.C.A. Rule 3(a) standards for adequacy of a Notice of Appeal are interpreted liberally, like its counterpart in Federal Rules of Appellate Procedure 3(a) and 3(c), and require acceptance of the May 30, 2002 "Notice" filing and the May 30, 2002 Rule 59 (e) Motion as the functional equivalents of a Notice of Appeal.**

The May 30, 2002, Sup. Ct. Civ. Rule 41(a)

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docketed with the Superior Court, is filed simultaneously with a D.C. App. R.(a) Petition for Rehearing by Panel and Rehearing En Banc and Motion for Stay of Mandate of this Court's November 27, 2002 Decision. That November 27, 2002 decision held that Words, Inc. May 30, 2002 "Rule 59(e)" motion was insufficient to toll the time for appealing Judge Bayly's May 15, 2002 summary judgment order and that a September 27, 2002 Notice of Appeal was untimely. Given that Words, Inc. is now invoking the functional equivalent of a timely (May 30, 2002) notice of appeal to establish this Court's jurisdiction, the November 27, 2002 Decision no longer arises from a real controversy, is advisory, and should be vacated as moot.

Notice filed by the appellant Words, Inc. declared the intent of Words, Inc. to seek the relief of timely appealing the trial court's May 15, 2002 decision and order granting summary judgment to the defendants. Indeed, the Rule 41(a)(i) Notice of voluntarily dismissing the new counts in the First Amended Complaint was entirely dedicated to clearing any possible final order impediments on Judge Zoe Bush's calendar so that Judge John Bayly's May 15, 2002 summary judgment for defendants could be appealed.[3] The May 30, 2002 Rule 41 Notice document was not, however, conditioned on or linked to a Rule 59(e) Motion that Words, Inc. also filed on May 30, 2002; indeed the May 30, 2002 Sup. Ct. Civ. Rule 41 Notice did not even refer to the Rule 59 motion filed on the same day. Nor was the May 30, 2002 Rule 41 Notice filing conditional on any future act of a judge or party.

A. Analogous Federal Rules of Appellate Procedure

The lack of a specific the words "of Appeal" after "Notice" in the caption, or the lack of specific filing fee or multiple copies of the appeal document, are not jurisdictional and cannot defeat use of this May 30, 2002 "Notice" as a Rule 3(a) notice of appeal. *Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (1990)(absence of notice of appeal filing fee and lack of requisite 8 copies was not jurisdictional and appeal document therefore satisfied Rule 3(a), even though it was initially rejected by the Clerk's office and not refiled with filing fee and copies

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3. Though the Words, Inc. v. Singer case moved to Judge Bush's calendar on January 1, 2002, Sup. Ct. Civ. R. 40-I(a), Judge Bayly sua sponte retained the motions for summary judgment filed in December 2001 and decided these motions on May 15, 2002.

until after 30 day appeal period expired).[4] The *Montgomery v. Docter* opinion called for liberal interpretation of D.C. App. R. 3(a), and relied heavily on Federal court interpretations of analogous Fed. Rule of Appellate Procedures 3(a) and 3(c), especially *Parissi v. Telechron, Inc.*, 349 U.S. 46, 99 L. Ed 867 (1955), holding that timely notice of appeal was not rendered invalid by lack of a timely filing fee required by statute.

This Court has continued to follow the *Montgomery v. Docter* directive to evaluate appeal invocation disputes under the D.C. App. Rules by examining Federal court interpretation of analogous Federal Rules of Appellate Procedure. *In Re J.W.*, 763 A. 2d 1129, 1131 (D.C. 2000), this Court cited to the F.R.A.P. and held in a juvenile criminal matter that the prosecutor's failure to file a mandatory Certificate on a suppression issue, did not deprive the Court of appeal jurisdiction because the notice of appeal was timely filed and signaled the appellant's intent to appeal. See also *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001)(citing to F.R.A.P. 15 precedents and excusing D.C. App. R. 15(a) requirement that Petition for Review from a corporation be signed by counsel; also citing preference in *Abell v. Wang*, 697 A. 2d 796, 800 (D.C. 1997), for this Court to hear issues on their merits). This Court should adhere to its use of Federal court precedents in deciding D.C. App. R. 3(a) issues, and should accordingly adopt the functional equivalency test to accept Words, Inc. May 30, 2002 appeal documents as properly invoking jurisdiction.

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4. The nature of a motion is determined by the relief sought and not the label or caption.
Wallace v. Warehouse Employees Union #730, 482 801, 804 (D.C. 1984).

B. Functional Equivalency Test in Federal Appeals

In *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. Cir. 1987), the leading case on adequacy of appeal-invoking documents from the U.S. Court of Appeals for the District of Columbia Circuit, our Circuit Court endorsed a functional equivalency standard and held that even a F.R.A.P. 10(b) filing, stating *merely* that no transcript would be ordered for an appeal, signaled the appellant's intent to appeal sufficiently to satisfy the notice of appeal requirements in F.R.A.P. 3.[5] *Nichols v. Asbestos Workers* is highly instructive to the appeal here, because the appellant Nichols filed a premature formal Notice of Appeal that was deemed ineffective but appellant was saved[6] by her filing the transcript declination within the correct appeal time. Appellant Words, Inc. filed, prior to Judge Bayly's May 15, 2002 Order becoming final on June 14, 2002, both a Rule 59(e) motion (held by this Court to be non-tolling) and a Rule 41 Notice stating its intent to appeal. Both documents timely signaled Words, Inc. intent

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5. See also Interstate Natural Gas Ass'n v. F.E.R.C, 756 F. 2d 166, 170 (D.C. Cir. 1985), holding that petitions for mandamus can be treated as notices of appeal ". . . because the content requirements of a notice of appeal. . . .may easily be met by a document of similar import, and the interests of justice may demand its acceptances as an effective substitute." [emphasis supplied].

6. See also Good Samaritan Hospital v. Sullivan, 952 F. 2d 1017, 1022 (8th Cir. 1991)(proffered Notice of Appeal was defective but Appeal Information Form filed within appeal time was functional equivalent of notice of appeal and invoked jurisdiction).

to appeal[7] and each can invoke this Court's jurisdiction.

In 1992, the U.S. Supreme Court overruled the three circuits that had denied use of an appellant brief as a substitute for a notice of appeal, and endorsed the functional equivalency doctrine for notices of appeal under F.R.A.P. 3. *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992), reversing *Smith v. Galley*, 919 F. 2d 893 (4th Cir. 1990). The Supreme Court held that a pro se appellant's notations on a pre-printed issues form--an informal brief and not even an informal notice of appeal–that was timely sent to the Court by the appellant[8], provided sufficient notice of intent to appeal to the U.S. Court of Appeals for the Fourth Circuit and therefore satisfied F.R.A.P. 3, *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992):

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7. The request for Remittitur filed seven days after the judgment and that was determined non-tolling for appeal purposes in Circle Liquors, Inc. v. Cohen, 670 A. 2d 381, 385 (D.C. 1996), did not mention the word "appeal" and was not asserted by the appellant to be the functional equivalent of a notice of appeal or a declaration of intent to appeal.

8. Under both F.R.A.P. 3 and D.C. App. R. 3(a), the Notice of Appeal is to be filed in the trial court. Both F.R.A.P. 4(d) and D.C. App. R. 4(a) mandate that a notice of appeal first filed wrongly in the Federal Court of Appeals or in the District of Columbia Court of Appeals shall be transmitted to the trial court but shall be deemed filed in the trial court on the date wrongly filed in the appeals court. The appellant Smith sent his notations on a pre-printed issue sheet for pro se appellants–an informal brief–to the Fourth Circuit within the appeal time and thus came under the saving clause of F.R.A.P. 4(d).

[t]he notice afforded by a document, not the litigant's motivation in filing it, determines the documents sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith v. Barry, 502 U.S. at 248.

The federal courts interpretation of F.R.A.P. 3 since *Smith v. Barry* has permitted invocation of appellate court jurisdiction under functional equivalency in far less innocent circumstances presented by Words, Inc. filing two documents on May 30, 2002 declaring intent to appeal within the appeal time. *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 156, 159 (D.C. Cir. 2002)(intent to appeal inferred from petitioner's statement of issues, despite F.R.A.P. 15 defect in Petition for Review of not identifying exact FCC Order appealed from). See also *Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C. Cir. 2002)(timely brief was a functional equivalent of a F.R.A.P. 15 Petition for Review and invoked appeal jurisdiction); *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal filed within appeal time was functional equivalent of F.R.A.P. 3 Notice of Appeal); *Haugen v. Nassau County Dep't of Soc. Services*, 171 F. 3d 136, 137 (2d Cir. 1999), citing *Smith v. Barry* and holding that even though the District Judge denied a letter-request for extension of time to file an appeal, the letter requesting the extension was filed within the appeal limit, identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal that invoked appellate

jurisdiction. [9]

C. The non-tolling Rule 59(e) Motion declared intent to appeal

While this Court should not have to reach the issue given the complete functional equivalency of the May 30, 2002 Rule 41 Notice to a D.C. App. R. 3(a) Notice of Appeal, Words, Inc. notes that the separate May 30, 2002 "Rule 59(e)" Motion four times mentions (including citing to this Appeals Court Rule 10) Words, Inc.'s intent to appeal Judge Bayly's May 15, 2002 Order granting summary judgment to the legal malpractice defendants and denying summary judgment to plaintiff. Under the liberal and appeal-inclusive interpretation of D.C. App. R. 3 and the analogous F.R.A.P. 3 endorsed by this Court, the D.C. Circuit, and the U.S. Supreme Court, the May 30, 2002 "Rule 59(e)" motion sufficiently declared Words, Inc. intent to appeal Judge Bayly's May 15, 2002 order and decision so that the Rule 59 motion separately and timely invoked this Court's appeal jurisdiction. There can be no mistake from the Rule 59(e) motion that the requirements of intent to appeal, party identification, signature by corporate appellant's counsel, and naming the order appealed from as per D.C.C.A. Rule 3(a), were all complied with, as was the functional equivalency doctrine set forth supra.

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9. See also *Brannan v. United States*, 993 F. 2d 709, 710 (9th Cir. 1993)(pro se letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983), cert. denied, 461 U.S. 934 (1984)(defendant's letter to district court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P. 3).

The May 30, 2002 Sup. Ct. Rule 41(a) "Notice" filed by Words, Inc., also complied with every procedural requirement of D.C. Court of Appeals Rule 3(a), in that the intent to appeal the May 15, 2002 summary judgment decision was stated explicitly, the order appealed from was identified, the appealing party was named, the appealing corporations's counsel signed the document, and all parties were served with the document.

Conclusion

Words, Inc. hereby moves that the May 30, 2002 Rule 41 Notice document, and alternatively the separate Sup. Ct. Rule 59(e) Motion docketed on May 30, 2002, serve to invoke the appeal jurisdiction of this Court pursuant to D.C. App. R. 3(a) to review the May 15, 2002 final order of Judge Bayly of the D.C. Superior Court granting summary judgment to the defendants and denying plaintiff Words, Inc. own motions for summary judgment. The May 30, 2002 Rule 41(a) Notice filing and the May 30, 2002 Rule 59(e) motion are part of the Superior Court record, are each the legal functional equivalent of a D.C.C.A. Rule 3(a) notice of appeal, and cannot be repudiated. Finally it is the duty of this Court to promote the interests of justice and accept these May 30, 2002 documents as properly invoking the Court's appeal authority. *Circle Liquors, Inc. v. Cohen,* 670 A. 2d 381, 385 (D.C. 1996).

Respectfully submitted,
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1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202

[Certificate of Service on all parties' counsel, December 11, 2002]

[Exhibit 1]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WORDS, INC.

CIV. NO. 00-CA-05875

V.

PIPER RUDNICK, NORMAN SINGER, ET AL.

PLAINTIFF'S RULE 41(a)(1)(I) NOTICE OF VOLUNATARY DISMISSAL OF FIRST AMENDED COMPLAINT COUNT 2 AND 3

Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Count 2 and Count 3 pleaded in the First Amended Complaint. Plaintiff's Motion for Leave to File a First Amended Complaint adding[10] Count 2 and Count 3, is pending and should now be considered moot. This voluntary dismissal of the First Amended Complaint and the two new counts pleaded therein, is made before any defendant has filed an Answer or motion for summary judgment with respect to the new counts 2 and 3 in th First Amended Complaint. Rule 41(a)(1)(i).

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10. The First Amended Complaint repleads Count 1from the original Complaint *verbatim*. Judge Bayly's May 15, 2002 summary judgment ruling apply to this Count 1 of the original Complaint.

Pursuant to Rule 41(a), this voluntary dismissal of Counts 2 and 3 in the First Amended Complaint is without prejudice. Plaintiff may move to re-file the First Amended Complaint with Counts 2 and 3 should any remand of Count 1 occur after appeal.

Respectfully submitted,

_____

John S. Lopatto III, D.C. Bar No. 965426; VSB#33980
1800 K St., N.W., Suite 300
Washington, D.C. 20006-2202
202-861-5800
Attorney for Plaintiff

[Certificate of Service on all parties' counsel, May 29, 2002]

[Exhibit 1 follows]

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.

APPEAL NO. 02-CV-1123

V.

PIPER MARBURY RUDNICK WOLFE, L.L.P.; NORMAN SINGER, JACKSON & CAMPBELL, P.C., ET AL.,

(D.C. Sup. Ct. Civ. 00-05875)

APPELLANT WORDS, INC.'S RULE 40 PETITION FOR REHEARING AND REHEARING EN BANC OF NOVEMBER 27, 2002 DECISION AND RULE 41(a) MOTION TO STAY OF MANDATE

Argument for Rule 40 Rehearing and Rehearing En Banc

1. **Because of appellant's accompanying Motion invoking this Court's appeal jurisdiction pursuant to two, timely filed functional equivalents of a D.C. App. R. 3(a) Notice of Appeal, the November 27, 2002 Decision and any D.C. App. R. 41 mandate dismissing the appeal as untimely, should be stayed and then vacated as advisory and moot.**

The accompanying Appellant Words, Inc. Motion to Invoke Appeal Jurisdiction Pursuant to May 30, 2002 Rule 41(a)(1) Notice, and Rule 59(e) Motion to Superior Court Stating Intent to Appeal and Each Providing Functional Equivalent of a D.C. App. R. 3(a) Notice of Appeal, should require the motions panel of this Court to stay the November 27, 2002 Decision and Order dismissing the

appeal as untimely. The Rule 41(a) mandate should be stayed as well while appellant's Motion to Invoke Appeal Jurisdiction on the basis of the May 30, 2002 filings is decided by this Court. After the appellant's motion is granted to invoke jurisdiction on the basis of two timely functional equivalents of a Rule 3(a) Notice of Appeal, the November 27, 2002 Decision and Order dismissing the appeal should be vacated because it no longer arises from a real controversy, is advisory only, and has become moot.

It is completely proper to proceed in this sequence of staying the November 27, 2002 dismissal of the appeal owing to assertion of two separate and timely documents serving as functional equivalents of a Rule 3(a) Notice of Appeal filed with the Superior Court within 30 days of the May 15, 2002 Decision and Order of the trial court granting the legal malpractice defendants summary judgment and denying summary judgment to plaintiff. The jurisdictional issues contested here may be decided at any time. See *Circle Liquors, Inc. v. Cohen*, 670 A. 2d 381 (D.C. 1996)(jurisdiction raised *sua sponte* by Court after oral argument on merits, with Court also making *sua sponte* examination of record to determine if timely filed documents did toll appeal time); and *Moore Energy Inc, v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001)(citing preference for hearing appeals of their merits and not scuttling them because of non-compliance with technical elements for a notice of appeal or petition for review). There is also no authority for penalizing appellant Words, Inc. for invoking jurisdiction in this fashion.

This Court should take up improvidence fo the petition for hearing and for hearing *en banc* on the merits of the November 27, 2002 Decision and Judgment only if this Court denies appellant Words, Inc. motion to invoke jurisdiction on the basis of the May 30, 2002 filings with the

Superior Court.

2. **Alternatively, the Court should reconsider and vacate the November 27, 2002 Decision as improvident and contrary to this Court's opinion in Circle Liquors Inc. v. Cohen, 670 A. 2d 381, 388 defining a tolling Rule 59(e) motion and contrary to D.C.C.A. Rule 3(a).**

This Court has never before judged compliance with Rule 4(a)(2) by using the trial judge's output after the proffered tolling motion is filed. The text of Rule 4(a)(2), especially Rule 4(a)(2) sub-phrase number three, plainly requires the tolling adequacy of the appellant's motion to be judged on the relief requested in the motion and **not** on the what relief the trial judge deems appropriate. In Words, Inc. May 29/May 30, 2002 Motion for Rule 59(e) Relief, Words, Inc. opened the motion with the sentence: "Pursuant to Rule 59(e), plaintiff moves the Court to both alter and amend the May 15, 2002 Order granting summary judgment to defendants and to permit supplementation of the record as follows." The appellant Words, Inc. then requested that the trial judge add to the May 15, 2002 summary judgment written decision (the "judgment") an explanation of the trial court's possibly improper and biased ex parte telephone calls to one to the defense counsel for defendant Jackson & Campbell, P.C. The addition to the summary judgment that was sought by appellant Words, Inc. was obviously to request the trial judge to add a clarification to the 25 page summary judgment opinion as to what standard of review the trial judge used in deciding to award Jackson & Campbell with summary judgment dismissal. The motions panel of this Court mistakenly faulted Words, Inc. for not alleging error or "factual assertions" as to the trial judge's conduct. How could Words, Inc. attack the trial judge's ex parte phone calls to one defense counsel when there was no

record of these calls?[11] To make a meaningful appeal on this standard of review issue, Words, Inc., without question, had to request Judge Bayly to admit in the record that he made the ex parte phone calls to his friend David Durbin who represented Jackson & Campbell. The Words, Inc. Rule 59(e) motion is worded this very way: "Plaintiff respectfully requests the Court, Judge John H. Bayly, Jr., to document for the record the reasons for and nature of any apparent expert parte telephone communications by the Court to Attorney David B. Durbin, counsel for then-defendant Jackson & Campbell, P.C.". There was no trial in this case, so the only "record" referred to is the 25 page, May 15, 2002 summary judgment opinion to which Judge Bayly added his written explanation of the ex parte phone calls in his August 30, 2002 written decision, which also denied plaintiff-appellant's motion to amend the record to include voluminous back up materials to commission summaries and excerpts included in the plaintiff's motion for summary judgment.

In the only case that this Court has analyzed the D.C. App. R.4(a)(2) tolling requirements for a timely proffered motion, the single criterion considered was that that the proffered motion ask the trial judge to do something affirmative, such as issue an order. *Circle Liquors, Inv. v. Cohen,* 670 A. 2d 381, 385 (D.C. 1996). The appellant Circle Liquor could only proffer a request for Remittitur of the jury's verdict, which this Court determined was not a tolling Rule 4(a)(2) motion because it asked only the other party Cohen to do something, i.e., accept less than

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11. Word, Inc.' motion reference to the ex parte phone calls was not record evidence that the call occurred. The recipient of Judge Bayly's two ex parte phone calls, defense counsel for defendant Jackson & Campbell, P.C., did not favor the record with any Affidavit explaining the calls.

the verdict amount, and did not ask the trial court to revise or alter the original order. In the present Words, Inc., case, the appellant Words, Inc.'s May 30, 2002 "Rule 59(e)" motion asked the trial judge to make an important alteration to the 25 page summary judgment decision by adding an explanation of the judge's ex parte phone calls to one of the successful defendant's lawyer prior to summary judgment briefing in the case. This Court wrongly measured the tolling prowess of Words, Inc.'s Rule 59(e) motion by stating "[T]he. . . trial court's explanation of the calls is not an additional factual finding." The inquiry should have been as to what the trial judge was asked to do by appellant Words, Inc., not what the trial court did after he was asked. In two prior cases where the appellant filed a timely request for the trial judge to "explain" "reconsider" or "clarify" his ruling, this Court treated the request as a tolling Rule 59(e) motion. These cases cannot be distinguished from what Words, Inc. requested of the trial judge on May 30, 2002 in its Rule 59(e) motion.

The Court also did not use the correct standard of review in deciding if appellant's Rule 59(e) motion satisfied the definitions of one or more of the five tolling motions in Rule 4(a)(2). In *Moore Energy Inc. v. Public Service Comm.*, 785 A. 2d 300, 305 (D.C. 2001), this Court cited analogous Federal court precedent interpreting the F.R.A.P. and permitted an appeal despite non-compliance with the D.C. App. R. 15(a) requirement that counsel sign a corporation's Petition for Review. The *Moore Energy* opinion stated the preference for promoting civil justice by deciding appeals on their merits rather than dismissing them on technical grounds, citing *Abell v. Wang*, 697 A. 2d 7967, 800 (D.C. 1997). In determining if Words, Inc. May 30, 2002 request to the trial judge that he explain his ex parte contacts with a successfully-dismissed defendant's lawyer, Words, Inc. was plainly attempting to fill in the standard of

review used by trial court so standard of review could be argued on appeal. The appellee-defendants all understood this and filed oppositions to the Rule 59(e) motion minimizing the importance of the ex parte phone calls. The trial court who used several pages to explain that his telephone calls to the defense counsel were for scheduling and did not address the merits.

The amended version of Rule 4(a)(2) plainly states in sub-phrase three that a motion to "vacate, alter, or amend the order or judgment" is a tolling motion. Words, Inc. by requesting Judge Bayly to add a written explanation of his ex parte conduct to the May 15, 2002 summary judgment opinion and order, textually satisfies both infinitives "to alter" and "to amend." This Court's November 27, 2002 decision never parses these terms in Rule 4(a)(2), and this mistake is magnified when sub-phrase 5 of Rule 4(a)(2), "and any other motion seeking relief in the nature of the foregoing" is used in the standard of review. Appellant Words, Inc. rightfully demanded of the trial judge that he add to the record an explanation of his ex parte conduct, and this demand fit properly into both sub-phrase two and sup-phrase five of D.C. App. R. 4(a)(2).

The motions panel of this Court stated that the trial judge did not make additional findings of fact
The trial judge did add an explanation of the ex parte telephone calls to the summary judgment decision documents; because the written summary judgment opinion constitutes the judgment appealed from, the addition of the ex parte contacts explanation to the summary judgment decision is also an "alteration" or amendment of the judgment that fully meets the tolling standard in Rule 4(a)(2), sub-phrase three.

3. A more liberal reading of D.C. App. R. 4(a)(2) should have been employed.

The Court also did not use the correct standard of review in deciding if appellant's Rule 59(e) motion satisfied the definitions of one or more of the five tolling motions in Rule 4(a)(2). In *Moore Energy Inc. v. Public Service Comm.*, 785 A. D 2d 300, 305 (D.C. 2001), this Court cited analogous Federal court precedent interpreting the F.R.A.P and permitted an appeal despite non-compliance with an explicit D.C. App. R. 15(a) requirement that counsel sign a corporation's Petition for Review. The appelles motion to dismiss also emphasized the need to follow the Federal courts interpretation of their appellate rules. The Moore Energy opinion stated the preference for promoting civil justice by deciding appeals on their merits rather than dismissing them on false "jurisdictional" grounds, citing *Abell v. Wang*, 697 A. 2d 7967, 800 (D.C. 1997). In determining if Words, Inc. May 30, 2002 request to the trial judge that he explain his ex parte contacts with a successfully-dismissed defendant's lawyer, Words, Inc. was plainly attempting to fill in the standard of review used by trial court so standard of review could be argued on appeal. The appellee-defendants all understood this and filed harsh oppositions to the Rule 59(e) motion minimizing the role of the ex parte phone calls. The trial court also grasped the importance of this matter for appeal and used several pages to explain that his telephone calls to the defense counsel were for scheduling, did not address the merits, and reflected no bias. This Court has treated even letters form counsel to the trial judge requesting "reconsideration" or explanation of a decision, as motions that satisfy Rule 4(a)(2). See, e.g., *Vincent v. Anderson*, 621 370 (D.C. 1993); *National Voter Contact, Inc. v. Versace*, 511 A. 2d 393, 396 (D.C. 1982).

Conclusion

The November 27, 2002 Decision and Order of this court and its Mandate, should be stayed pending consideration of appellant Words, Inc.' rights to invoke appellate jurisdiction on the basis of the two May 30, 2002 filed documents, as argued in Words, Inc. motion filed this day. After appeal jurisdiction is recognized, the November 27, 2002 Decision should be vacated as moot. Alternatively, the Court should vacate the November 27, 2002 as improvident on the merits and inconsistent with the liberal application of the D.C. App. Rules that recognize intent to appeal.

Respectfully submitted,

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[Certificate of Service on all parties' counsel, December 11, 2002]

DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.,
APPELLANT

Appeal No. 02-CV-1123

V.

PIPER MARBURY RUDNICK WOLFE, LLP; NORMAN SINGER, ET AL., JACKSON & CAMPBELL, P.C., ET AL.,
APPELLEES

(D.C. Sup. Ct. Civ. 00-05875)

APPELLANT WORDS, INC.'S RULE 40 PETITION FOR REHEARING AND REHEARING EN BANC OF FEBRUARY 28, 2003 MERITS DIVISION'S DENIAL OF WORDS' DECEMBER 11, 2002 MOTION TO INVOKE APPEAL JURISDICTION PURSUANT TO MAY 30, 2002 APPEAL-INTENT FILINGS; AND RULE 41(A) MOTION TO STAY MANDATE

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March 12, 2003

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DISTRICT OF COLUMBIA COURT OF APPEALS

WORDS, INC.,

V.

APPEAL NO. 02-CV-1123

PIPER MARBURY RUDNICK WOLFE, LLP; NORMAN SINGER, ET AL., JACKSON & CAMPBELL, P.C., ET AL.,

(D.C. Sup. Ct. Civ. 00-05875)

Appellant Words, Incorporated's Rule 40 Petition for Rehearing and Rehearing En Banc of February 28, 2003 Merits Division Denial of Appellant's Motion to Invoke Appeal Jurisdiction on Basis of Timely Filed Appeal-Intent Documents

The Court's February 28, 2003 *per curiam* order appears to confirm that the appellant's separate motion to appeal the May 15, 2002 order of the trial court on the basis of two appeal-intent documents filed on May 30, 2002, was not yet circulated to the Court *en banc.*

Because of the importance of this jurisdictional issue and avoidance by the merits division of several precedents of this Court, the U.S. Supreme Court and the U.S. Court of Appeals for the D.C. Circuit interpreting appeal-invoking filings, appellant is forced to request Rehearing and Rehearing *En Banc* of the February 28, 2003 order to deny appellant's appeal rights in this case.[12] At a minimum, the merits division should explain its refusal to discuss or

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12. Appellant Words also moves pursuant to D.C. App. R. 41(a) to stay the issuance of any mandate in this case.

endorse the functional equivalency doctrine under the Federal court interpretations of F.R.A.P. 4 that are powerful interpretive guides to the question presented. That doctrine would treat the filings by Words on May 30, 2002 as functional equivalents of a conventional Notice of Appeal of the May 15, 2002 order of the trial court.

Background to Words' Preservation of its Appeal Rights

After the trial judge issued a final order on May 15, 2002 granting defendants' motion for summary judgment in this legal negligence action, plaintiff-appellant Words on May 30, 2002 filed a Rule 59(e) captioned motion that sought to have the trial court amend the May 15, 2002 judgment order by adding an explanation of *ex parte* telephone calls the trial judge made to one of the defense counsel in this case in September 2001 and March 2002 that pertained directly to the case. The law firm client of that defense lawyer was one of the defendants dismissed by Judge Bayly's May 15, 2002 Order. The trial judge provided the explanation of the telephone calls in an August 30, 2002 Order that also ruled on certain costs petitions of the victorious defendants. Appellant-plaintiff Words filed a Notice of Appeal on September 27, 2002. This Court on November 27, 2002 ruled that Words' May 30, 2002 Rule 59(e) motion did not sufficiently request amendment of the May 15, 2002 judgement order in favor of defendants and therefore did not qualify under D.C. App. R. 4(a)(2) as a motion tolling the time for appeal of the May 15, 2002 order. Under this ruling, Words' September 27, 2002 formal Notice of Appeal was untimely to invoke appeal jurisdiction over the May 15, 2002 order of the trial court.

No Court or appellee has addressed Words' *other* means of invoking appeal jurisdiction on the basis of plaintiff's filings within 30 days of the May 15, 2002 order. Plaintiff's Rule 41(a)((1)(i) Notice of Voluntary Dismissal

of First Amended Complaint Count 2 and Count 3, docketed with the Superior Court Civil Clerk on May 30, 2002 after service on all parties[13], states in its first sentence that "Owing to plaintiff's desire to appeal as a final order Judge John Bayly's May 15, 2002 grant of summary judgment for all defendants on Count 1 of the original (and First Amended) Complaint, plaintiff Words, Incorporated notes its voluntary dismissal of the First Amended Complaint and Counts 2 and Count 3 pleaded in the First Amended Complaint." This language in the captioned Sup. Ct. Civ. Rule 41 Notice declares Words' intent to appeal and meets all of the requirements for perfecting an appeal of Judge Bayly's May 15, 2002 summary judgment for defendants set forth in D.C. App. R. 3(a) and R. 4(a)(1). No particular form for a notice of appeal is required, as long as the document reaches the Clerk before the 30 days appeal time has expired; is signed by a corporate appellant's counsel; specifies the party taking the appeal; and designates the order appealed from. D.C. App. R. 3(a). The Superior Court Civil Rule 41 Notice of this appellant Words, Inc. was docketed on May 30, 2002 by the Superior Court's Civil Division Clerk, Exh. 1, and fulfilled every one of these threshold requirements of D.C. App. R. 3(a).

Appellant Words, Inc. invokes this Court's jurisdiction on the basis of this May 30, 2002 Notice document filed with the Superior Court. This May 30, 2002 Notice document is the functional equivalent of a formal D.C. App. R. 3(a) Notice of Appeal, and is manifestly sufficient to invoke the appeal jurisdiction of this Court to review the May 15, 2002 final order of the trial court granting summary judgment to the legal malpractice

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13. A copy of this Rule 41(a) Notice document with the May 30, 2002 Superior Court docket stamp, is attached as Exhibit 1.

defendants and denying summary judgment for plaintiff.

In addition, the non-tolling Rule 59(e) motion also filed on May 30, 2002 specifically stated Words' intent to appeal and indeed asked for a record correction and record supplement to ensure a meaningful appeal record. The Rule 59(e) filing must be judged on what it stated and not on any label accompanying the motion.

Argument

1. **The Merits Division Denial of the Appellant-plaintiff's Motion to Invoke Appeal Jurisdiction on the Basis Two Timely Filed Appeal-intent Documents, is Violently at Odds with D.C. App. R. 3(a) Precedents Authored by Judges Other Than Merits Divisions Members.**

Rejection *ab initio* of Words' alternative appeal notices would be directly contrary to four decisions of this Court authored by non-division Judges who applied analogous F.R.A.P. principles to all but invoke the functional equivalency doctrine. In *Re J.W.*, 763 A. 2d 1129 (D.C. 2000), Judge Steadman, joined by J.J. Farrell and Glickman, cited to Federal court interpretations of F.R.A.P. to hold that in a juvenile criminal matter, the prosecutor's failure to file a mandatory Certificate of a suppression issue did not deprive this Court of jurisdiction because the notice of appeal was timely and signaled the appellant's intent to appeal. In *Moore Energy Inc. v. Public Service Comm*, 785 A. 2d 300, 305 (D.C. 2001), Judge Mack wrote for the Court (including Judge Reid of this merits division) that the mandatory requirement in D.C. App. R. 15(a) that a Petition for Review from a corporation be signed by counsel should be excused owing to the preference in F.R.A.P. 15 precedents to honor the appellant's stated intent to appeal and not scuttle the appeal

for technical reasons.[14]

In *Montgomery v. Docter, Docter, and Salus*, 578 A. 2d 176 (D.C. 1990), a *per curiam* decision from this Court's panel comprised of Judges Ferren, Steadman, and Pryor, granted jurisdiction upon a technically untimely Notice of Appeal. The original Notice of Appeal filing made within 30 days lacked a filing fee and the requisite eight copies; was rejected by the Superior Court's clerk's office; and was not refiled with the filing fee and copies until after the 30 day appeal period expired. Similarly in *Circle Liquors Inc. v. Cohen*, 670 A. 2d 381, 385 (D.C. 1996), Judge King with Judge Belson, but with Chief Judge Wagner dissenting to the dismissal of the appeal, required a search of the record to see if the appellant had properly

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14. This Court must be mindful to derivation of its appeal rules from the F.R.A.P., where Words May 30, 2002 appeal-intent documents would clearly be the functional equivalent of a formal and timely Notice of Appeal. Turning away Words' May 30, 2002 appeal-intent documents would wrongly cast this case into the jurisprudence of states who eschew the F.R.A.P. in their appeal rules. Virginia, for example, uses appeal rules completely independent of F.R.A.P. and recently rejected a civil defendant's appeal of a $6 million verdict because the defendant-appellant's notice of appeal was signed by the defendant's *pro hac vice* trial counsel who was not a member of the Virginia Bar. The signature on the Notice of Appeal ran afoul of Va. Supreme Ct. Rule 1A:4, which states that when foreign state counsel are admitted to a Virginia court upon courtesy for a particular case, " . . . a pleading, or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by a member of the Virginia State Bar." *Wellmore Coal Corp. v. Harmon Mining Corp.*, 264 VA. 279, 568 S.E. 2d 671 (Va. 2002).

invoked appeal jurisdiction by filing "a paper" admittedly not labeled "Notice of Appeal".[15]

The results in these four cases authored by three Judges outside this merits division, are patently at odds with the refusal of the merits division to search the record for timely appeal-invoking documents. This contradiction and lack of uniformity in decisions should be of deep concern to the Court *en banc*. Both the merits division and the Court *en banc* should accept appellant Words' invocation of appeal jurisdiction on the basis of the two timely filed documents memorializing Words intent to appeal the trial judge's May 15, 2002 final order.

2. **This Court Must Defer to the Federal Courts' Highly Likely Acceptance of the Words' Alternative and Timely Appeal-Intent Documents Under the Functional Equivalency Doctrine.**

This Court's jurisdiction-invoking rules in D.C. App. 3 and 4 are derived from the analogous F.R.A.P., and well-settled Federal court interpretations of F.R.A.P. should be heeded by this Court

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15. The search of the record in *Circle Liquors* was largely *sua sponte* because the parties did not brief whether plaintiff's "Amended Remittitur Offer" filed seven days after the verdict, could be construed as an appeal-tolling motion. The *Circle Liquors* Court determined that the Amended Remittitur did not use any terms associated with a Rule 4(a)(2) tolling document. Chief Judge Wagner dissented, citing to the rule endorsed frequently by this Court and the legal malpractice defendants here, that the nature of a motion is determined by the relief sought, not by its label or caption, *Frain v. District of Columbia*, 572 A. 2d 447, 450 (D.C. 1990).

This merits division's denial of Words' motion to invoke appeal jurisdiction on the two May 2002 appeal-intent documents, is erroneous, especially given the U.S. Supreme Court holding in *Smith v. Barry,* 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed 2 678 (1992), that an appellant's mere notations on a pre-printed, issue-identification form, filed within the appeal period, was the functional equivalent of a F.R.A.P. 3 notice of appeal and invoked appeal jurisdiction.

Well before *Smith v. Barry* was decided by the Supreme Court, our own circuit in *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F. 2d 881, 889 (D.C. 1987) endorsed the functional equivalency standard and held that even a F.R.A.P. 10(b) filing limited to declining a transcript, sufficiently signaled the appellant's intent to appeal to satisfy the notice of appeal requirements in F.R.A.P. 3. *Nichols* is highly instructive for the Words' appeal, because appellant Nichols filed a premature and void Notice of Appeal but was saved by her filing a transcript declination within the appeal time limit. Prior to Judge Bayly's May 15, 2002 Order becoming final on June 14, 2002, Words filed both a Rule 59(e) Motion[16] mentioning imminent appeal several times *and* a Rule 41 Notice dismissing a proposed First Amended Complaint and Motion for Leave to file this Amended Complaint. The latter stated Words' intent to appeal Judge Bayly's May 15, 2002 order as the very basis for withdrawing the proposed First Amended Complaint. Since the Supreme Court decision in *Smith v. Barry,* the federal courts interpretation of F.R.A.P. has applied functional equivalency in far less innocent circumstances than presented by Words here filing

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16. This Court determined this Rule 59(e) motion to be non-tolling under D.C. App. R. 4. This Court en banc declined to review this determination.

two documents on May 30, 2002 declaring intent to appeal. *Sinclair Broadcasting Corp. v. Federal Communications Comm.*, 284 F. 3d 156, 159 (D.C. Cir. 2002), inferred intent to appeal from the petitioner's statement of the issues, despite a flawed F.R.A.P. 15 Petition for Review that failed to comply with the mandatory Rule 15(a)(2)(C) term to specify the FCC order appealed from. See also *Ruggierio v. Federal Communications Comm.*, 278 F. 3d 1323, 1327 (D.C Cir. 2002)(timely brief was the functional equivalent of a F.R.A.P. Petition for Review and invoked appeal jurisdiction); *Rinaldo v. Corbett*, 256 F. 3d 1276, 1279 (11th Cir. 2001)(motion for extension of time to appeal itself filed within appeal time was functional equivalent of F.R.A.P. 3 Notice of Appeal); *Haugen v. Nassau County Dep't of Soc. Services*, 171 F. 3d 137 (2d Cir. 1999), citing *Smith v. Barry* and holding that even though the District Judge denied a letter-request for extension of time to file an appeal, the letter requesting the extension was filed within the appeal limit, identified the parties and judgment appealed from, and was the functional equivalent of a notice of appeal to invoke appeal jurisdiction.[17]

Conclusion

To ensure uniformity of decisions within this Court and with the U.S. Supreme Court and U.S. Court of Appeals for the D.C. Circuit accepting analogous F.R.A.P. functional equivalents of notices of appeal, the merits

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17. See also *Brannan v. United States*, 993 F. 2d 709, 710 (9th Cir. 1993)(pro se letter from prisoner to court asking "to get sentence reduced" was sufficient to serve as notice of appeal); and *United States v. Ward*, 696 F. 2d 1315, 1318 (11th Cir. 1983, *cert denied*, 461 U.S. 934 (1984)(defendant's letter to District Court expressing intent to appeal and requesting appointment of attorney held sufficient to note appeal under F.R.A.P. 3).

division and the Court *en banc* must grant appellant's motion to invoke appeal jurisdiction on the basis of the two appeal-intent documents filed on May 30, 2002. These timely-filed documents put into writing clear and unmistakable intent of Words to appeal the trial judge's May 15, 2002 order.

Respectfully submitted,

_____

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(3)

No. 03-995

Supreme Court, U.S.
FILED
FEB 12 2004
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In The

Supreme Court of the United States

WORDS, INC.,

Petitioner,

v.

NORMAN H. SINGER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2003

No. 03-995

WORDS, INC.

Petitioner,

v.

NORMAN H. SINGER, et al.

Respondents.

On Petition for Writ of Certiorari to the
District of Columbia Court of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Norman H. Singer; Piper, Marbury, Rudnick, Wolfe, LLP; Jackson & Campbell, P.C.; Singer & Associates, P.C. (together, the "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari (the "Petition") filed by Petitioner, Words, Inc. ("Words" or "Petitioner").

OPINIONS BELOW

The Opinion of the District of Columbia Court of Appeals dismissing Petitioner's appeal to that Court is reported at 870 A.2d 910 (2002) and is reproduced in Petitioner's Appendix commencing at page 49. That same Court's Order denying Petitioner's "Motion to Invoke Appeal Jurisdiction" and first Petition for Rehearing and Rehearing *En Banc* is reproduced in Petitioner's Appendix at page 52. The District of Columbia Court of Appeals' Order denying Petitioner's second Petition for Rehearing and Rehearing *En Banc* is reproduced in Petitioner's Appendix at page 53.

The decision of the Superior Court of the District of Columbia granting summary judgment in favor of Respondents is reproduced in Petitioner's Appendix commencing at page 17. The Superior Court's Order denying Petitioner's "Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60(a)" is reproduced in Petitioner's Appendix commencing at page 41. References below to the decisions and orders of the lower courts are to the appropriate page of the Petitioner's Appendix and are designated as "Pet. App."

JURISDICTION

This Court lacks jurisdiction to grant the Petition for two separate reasons. First, the Petition, and Petitioner's Application for an extension of time to file the Petition, were not filed within the 90 day time

required by 28 U.S.C. § 2101(c). Second, 28 U.S.C. § 1257 does not support jurisdiction here because the judgment below is not based upon the resolution of a federal question, but rather rests upon non-federal grounds involving the District of Columbia Court of Appeals' interpretation of its own rules of appellate procedure and the jurisdiction of that Court to entertain appeals from the Superior Court of the District of Columbia.

STATUTORY PROVISIONS

28 U.S.C. § 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 2101:

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * *

STATEMENT OF THE CASE[1]

Petitioner filed a legal malpractice action against Respondents in the Superior Court of the District of Columbia. After a hearing held on April 3, 2002, the Superior Court, on May 15, 2002, issued a Memorandum Opinion and Order (the "May 15, 2002 Summary Judgment Order") granting Respondents' Motions for Summary Judgment against Petitioner, entering final judgment in favor of each Respondent and denying Petitioner's own dispositive motion. Pet. App. 17-34. The May 15, 2002 Summary Judgment Order was entered on the docket of the Superior Court on May 16, 2002.

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[1] Respondents present their own Statement of the Case because they do not believe that Petitioner's Statement of the Case fully and accurately reflects the proceedings below. *See* Sup. Ct. Rule 15.1.

Thereafter, on May 30, 2002, Petitioner filed a motion entitled "Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60(a)" (the "Post-Summary Judgment Motion").[2] Pet. App. 35-37. In the Post-Summary Judgment Motion, Petitioner, implying some impropriety on the part of the trial judge, requested that the trial judge explain "for the record the reasons for and nature of any apparent ex parte telephone communications by the Court" with counsel for Respondent, Jackson & Campbell, P.C. Pet. App. 35. Petitioner also sought permission from the trial court to supplement the record on appeal with evidence (documents) not submitted by Petitioner in briefing the summary judgment motions and which, therefore, were not considered by the trial court in its summary judgment rulings. Pet. App. 36-37.

On September 3, 2002, an Order was entered, *inter alia*, denying Petitioner's Post-Summary Judgment Motion. Pet. App. 41-48. In its Order, the trial court denied permission for Petitioner to "enlarge a record by subsequent inclusion of material from which [Petitioner] has purposely excerpted selected segments (comprising ten pages out of 135 pages referring to an additional 1,500 pages of reports and summaries). . . ." Pet. App. 44. Regarding its communications with counsel, the trial court explained that it communicated

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[2] Following the hearing on the summary judgment motions, but before the issuance of the Summary Judgment Order, Petitioner moved for leave to file a First Amended Complaint. On May 30, 2002, Petitioner filed a Notice of Voluntary Dismissal (the "Notice of Dismissal"), the effect of which was to withdraw the Motion for Leave to File an Amended Complaint. *See* Pet. App. 39-40.

with counsel for the administrative purpose of obtaining counsel's assistance in scheduling a telephone conference with all of the parties' counsel and a motions hearing. Pet. App. 46.

Petitioner filed its Notice of Appeal of the May 15, 2002 Summary Judgment Order on September 27, 2002. Respondents subsequently moved to dismiss the appeal because Petitioner's Notice of Appeal was not filed within thirty days after entry of judgment by the District of Columbia Superior Court and because Petitioner's Post-Summary Judgment Motion was not one of those specific motions which tolled the period for filing a notice of appeal. *See* D.C. Ct. App. R. 4(a)(2); *see also* D.C. Ct. App. R. 4(a)(1) (requiring that appeals be filed within thirty days after entry of the judgment from which the appeal is taken). On November 27, 2002, a three judge panel of the District of Columbia Court of Appeals entered an order finding that Petitioner's appeal to that Court was not timely filed. Pet. App. 49-51. As a result, the Court of Appeals held it lacked jurisdiction over the appeal and, therefore, dismissed the appeal. Pet. App. 51.

Thereafter, on December 11, 2002, Words filed a Petition for Rehearing and Rehearing *En Banc* (the "First Petition for Rehearing"), as permitted by D.C. Ct. App. R. 40. In the First Petition for Rehearing, Words, for the first time, argued that the Post-Summary Judgment Motion and the Notice of Dismissal satisfied the requirement in Rule 3 of the Rules of the District of Columbia Court of Appeals that an appeal shall be "taken by filing a notice of appeal with the Clerk of the Superior Court . . . ." The First Petition for Rehearing

was denied by the District of Columbia Court of Appeals on February 28, 2003. Pet. App. 52. Notwithstanding that the District of Columbia Court of Appeals' rules contemplate the filing of only one request for rehearing, Words, on March 12, 2002, filed a second Petition for Rehearing and Rehearing *En Banc* (the "Second Petition for Rehearing"). The Second Petition for Rehearing was denied on June 26, 2003. Pet. App. 53.

On September 12, 2003, Petitioner applied to Chief Justice Rehnquist for an extension of time of sixty days to file its Petition for Writ of Certiorari (the "Application for Extension"). The Application for Extension was granted on September 17, 2003. Words filed its Petition for Writ of Certiorari on October 24, 2003.

The Application for Extension was filed more than ninety days after the District of Columbia Court of Appeals denied Words' First Petition for Rehearing. Supreme Court Rule 13.5 requires that an application for extension of time be filed "at least 10 days before the date the petition is due, except in extraordinary circumstances." The Application for Extension (and therefore Words' Petition for Writ of Certiorari) can only be considered timely if the filing of Words' Second Petition for Rehearing before the District of Columbia Court of Appeals operated to toll the time for filing a petition for certiorari with this Court. Because it did not, this Court lacked jurisdiction over this matter at the time the Application for Extension was granted and the Petition must be denied as untimely. The Petition must also be denied because it does not present a federal question.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO APPLY FOR A WRIT OF CERTIORARI WITHIN NINETY DAYS AFTER THE ENTRY OF THE JUDGMENT BELOW, LEAVING THIS COURT WITHOUT JURISDICTION OVER THIS MATTER.

In accordance with 28 U.S.C. § 2101(c), a petition for writ of certiorari in a civil action must be filed within ninety days after the entry of judgment. The ninety-day period for making application to this Court for a writ of certiorari is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).[3] A petition that is not timely filed must, therefore, be dismissed. *Id.*[4]

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[3] For good cause shown, the ninety day period may be extended for a period not exceeding sixty days by application to a Justice of this Court. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5.

[4] This Court has long-recognized that the federal statutes which limit the Supreme Court's jurisdiction to "those cases where review is sought within a prescribed period" reflect a public policy that litigation must at some definite point be brought to an end. *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952); *see also Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 415 (1943) ("The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands."); *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 268 (1942); *cf. Browder v. Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 265 (1978) (the same principle applies to appeals from the District Courts to the Circuit Courts of Appeals).

A timely filed request for rehearing filed with a state or lower federal court tolls the ninety-day period for filing a petition for writ of certiorari with this Court "until rehearing is denied or a new judgment is entered on the rehearing." *Jenkins*, 495 U.S. at 45 (citing *Department of Banking, State of Neb. v. Pink*, 317 U.S. 264, 266 (1942)); Sup. Ct. R. 13.3; *accord Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 498-99 (1927); *Morse v. United States*, 270 U.S. 151, 154 (1926) ("The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing.").

The time for filing a petition for certiorari, however, is not tolled by "[t]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied . . . ." *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940). In that same regard, the ninety-day period is not suspended by "the mere presentation of a motion for leave to file a second request for rehearing" unless such a motion is "actually entertained by the court. . . ." *Gypsy Oil*, 275 U.S. at 499.

Thus, in *Gypsy Oil*, this Court denied as untimely a petition for certiorari that was filed more than ninety days after the denial of a petition for rehearing by the Supreme Court of Oklahoma (but within ninety days after the denial of an application for leave to file a second petition for rehearing). 275 U.S. at 498-99. Remaining steadfast to the principle that the time for filing a petition for certiorari is jurisdictional,

this Court, in *Matton Steamboat, supra,* refused to allow the "[w]ould-be appellants [to] prolong indefinitely the appeal period, by making application [for appeal] to one judge within the three months and upon its denial by applying successively to other judges even after the prescribed time for appeal has ended." 319 U.S. at 415. There, the Court held that it was without jurisdiction to entertain an appeal from a state court. *Id.*

Other decisions by this Court have also upheld the policy of bringing finality to litigation when would-be appellants do not act with the requisite diligence in petitioning for certiorari. *See, e.g., Federal Trade Comm'n, supra,* 344 U.S. at 211-13 (dismissing as untimely petition for writ of certiorari not filed within ninety days of the entry of judgment by the Seventh Circuit Court of Appeals, and holding that the time period for filing a petition did not run anew from the circuit court's later decision which, in substance, did not disturb or revise legal rights and obligations that were settled with finality in its prior judgment); *Pink, supra,* 317 U.S. at 265-68 (dismissing petition for certiorari as untimely because a motion to the Supreme Court of New York that it amend its remittitur by adding to it a statement that a federal question was presented and passed upon by that court did not toll the time for filing a petition for certiorari to the United States Supreme Court); *Morse,* 270 U.S. at 154 (dismissing appeal as untimely because the Rules of the Court of Claims did not allow for the filing of a second motion for new trial and, therefore, the second motion could not have been "duly and seasonably filed. . . .").

The Rules of the District of Columbia Court of Appeals allow a party just one opportunity to request a rehearing of motions decided by that Court. D.C. Ct. App. R. 40. Thus, Words had exhausted all of its remedies before that Court upon the denial of the First Petition for Rehearing on February 28, 2003. As a result, as of that date, proceedings before the District of Columbia Court of Appeals were final and the time for filing a petition for writ of certiorari to this Court began to run. *See Pink*, 317 U.S. at 268 (proceedings before a lower court are final and the time for filing a petition for writ of certiorari begins to run when "the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court."). The time for filing a petition for writ of certiorari was not further tolled by the filing of the Second Petition for Rehearing because the Second Petition was not entertained or considered on its merits. Indeed, because the rules of the District of Columbia Court of Appeals did not allow for the filing of a second petition for rehearing, Words' Second Petition for Rehearing could not have been "duly and seasonably filed. . . ." *Cf. Morse*, 270 U.S. at 154.

The time for filing a petition for writ of certiorari with this Court began to run on March 1, 2003 and expired ninety days later, on May 29, 2003. Thus, the time for filing a petition for writ of certiorari had run, and this Court lacked jurisdiction over this matter, when Words submitted its Application for Extension on September 12, 2003. Accordingly, the Petition must be denied.

II. THIS COURT LACKS JURISDICTION OVER THIS MATTER BECAUSE THE DISTRICT OF COLUMBIA COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL TO THAT COURT RESTED EXCLUSIVELY ON NON-FEDERAL GROUNDS.

Words' appeal to the District of Columbia Court of Appeals was dismissed because the appeal to that court was not filed in a timely fashion, leaving the Court of Appeals without jurisdiction to consider the case. Pet. App. 51. Words' Petition to this Court may be granted only if a federal question was raised by the proceedings below. 28 U.S.C. § 1257; *see also* Sup. Ct. R. 10(b)-(c) (consideration will be given to cases from state courts in which an important federal question has been decided).

As described by this Court in *Pernell v. Southall Realty*, 416 U.S. 363 (1974), pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970,[5] the District of Columbia court system was restructured "so that 'the District will have a court system comparable to those of the states and other large municipalities.'" 416 U.S. at 367 (quoting H.R. Report No. 91-907, p. 23 (1970)). Section 11-743 of the D.C. Code, passed by Congress as part of the Court Reform Act, provides that the District of Columbia Court of Appeals "shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." D.C. Code § 11-743.

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5 Pub. L. 91-358; 84 Stat. 473 (codified at D.C. Code tit. 11).

Going forward from the date of the enactment of § 11-743, the statute plainly allows the Court of Appeals the complete discretion and authority that the highest court of any state would have to promulgate and interpret its own rules of procedure. Thus, the Court of Appeals, in its discretion, may continue to follow the Federal Rules as the rules of procedure before that court, or modify them in toto or in part, as that court deems appropriate. Section 11-743 gives rule-making authority to the Court of Appeals, thus making issues of court procedure and rule interpretation in the District of Columbia Court system matters of local concern, over which this Court has no jurisdiction. Indeed, this Court has long-recognized that it lacks jurisdiction to interpret states' interpretations of their own rules of procedure, even when such rules are modeled after federal rules. *See Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) ("Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court."); *Miller v. Anderson*, 150 U.S. 132, 136-37 (1893) ("A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals; . . . and in such cases an examination may be necessary of the acts of congress, [and] the rules of the federal courts, . . . and yet the questions for decision would not be of a federal character."); *see also Griffin v. United States*, 336 U.S. 704, 717 (1948) (". . . it has become settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be

determined - in the absence of specific Congressional legislation - by the highest appellate court for the District.").[6]

Petitioner does not - and, indeed, cannot - assert that its underlying claim of legal malpractice raised a federal question. Nor does Petitioner claim that some federal right of Words was infringed at any stage of the proceedings below. Rather, Petitioner argues that because the Rules of the District of Columbia Court of Appeals are modeled after the Federal Rules of Appellate Procedure, the Court of Appeals, in construing Rules 3 and 4 of procedure before that court, was required to follow the federal courts' interpretation of the parallel federal rules, which interpretations (according to Words) compelled a different result below.

Because the rules of procedure before the Court of Appeals were modeled after the Federal Rules of the Appellate Procedure, the Court of Appeals considers federal courts' interpretations of the federal rules as persuasive, but not binding, authority in interpreting similar District of Columbia rules. *Tupling v. Britton,* 411 A.2d 349, 351 (D.C. 1980) ("While this court is not

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[6] This Court, in *Pernell, supra,* stated that "decisions of the District of Columbia Court of Appeals on matters of local law - both common law and statutory law - will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." 416 U.S. at 368; *see also United States v. Dixon,* 509 U.S. 688, 701 n.6 (1993) (noting that the Court ordinarily accepts the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals).

bound by the federal courts' interpretations of federal rules essentially identical or similar to our rules, *those interpretations may be accepted as persuasive authority* in interpreting our rules.") (emphasis added). No statute, rule or decisional authority from the District of Columbia requires that federal courts' interpretations of the federal rules be accepted (or considered) by the District of Columbia Court of Appeals in interpreting its own rules.

This Court lacks jurisdiction to review a state court's decision when the state court "chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions," and the federal precedents "do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Because the issue was not raised by Words until the filing of its First Petition for Rehearing before the Court of Appeals, the Court of Appeals' published decision dismissing Words' appeal as untimely does not address whether the Post-Summary Judgment Motion and the Notice of Dismissal are sufficient substitutes for a proper Notice of Appeal, and the Court of Appeals did not explicitly set forth its reasons for the court's subsequent denials of the Petitions for Rehearing. Pet. App. 52-53. Under *Long*, this Court lacks jurisdiction over this matter because the Court of Appeals chose not to rely on federal precedent in disposing of Words' appeal to that Court. Jurisdiction would be lacking even if the rule of construction espoused by the Court of Appeals in *Tupling* is deemed to have necessarily guided the Court of Appeals' dismissal of Words' appeal and its denial of the Petitions for Rehearing, because the federal courts'

interpretations of Rules 3 and 4 of the Federal Rules of Appellate Procedure would only be persuasive, and not binding authority on the Court of Appeals.

The District of Columbia Court of Appeals' dismissal of Words' appeal was based on that court's own procedural rules. The Court of Appeals held simply that Petitioner failed to comply with procedural requirements that were to be followed in order to pursue Petitioner's state law claim on appeal. The Court of Appeals (1) did not explicitly rely on federal precedent in disposing of Petitioner's state law claim; (2) was not constrained to review any federal precedent; and (3) to the extent that it did review federal precedent, the Court of Appeals was not required to accept the federal precedent as binding. In short, the decision below rested solely on a state court's interpretation of a state court rule of procedure in connection with the disposition of a state law claim. The Petition does not raise a federal question and this Court, therefore, lacks jurisdiction to grant the Petition.[7]

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[7] Jurisdiction would be lacking here even if some federal claim brought by Words was forfeited as a result of a violation of a state procedural rule, where the state-law ground for dismissal was "'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). This rule is consistent with this Court's recognition of "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (barring consideration of habeas corpus claim following a default under state procedural rules, absent actual prejudice as a result of a violation of federal law or a fundamental miscarriage of justice.)

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari filed by Petitioner, Words, Inc.

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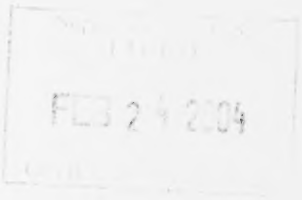
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No. 03-995

SUPREME COURT
OF THE UNITED STATES
October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick
Wolfe, L.L.P.; Jackson & Campbell, P.C.
Singer and Associates, P.C., and John Craig,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
DISTRICT OF COLUMBIA COURT OF
APPEALS

REPLY BRIEF OF PETITIONER

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February 23, 2004

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Petitioner's Argument in Reply

1. An Urgent Federal Question Is Presented under 28 U.S.C. §1257, and the D.C. Court of Appeals Could Not Have Acted Exclusively on Non-Federal Grounds.

In *Palmore v. United States,* 411, U.S. 389, 395 (1973), this Court specifically rejected respondents' central argument, *i.e.*, that the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, including D.C. Code §11-743, equated the D.C. Code with state law for purposes of 28 U.S.C. §1257 review. Respondents do not address *Palmore*.

Petitioner Words, Inc.'s rights under a statute of the United States are directly implicated in this case. 28 U.S.C. §1257. The respondents minimize the fact that Congress—not some state legislature—chartered the D.C. Court of Appeals and directed this court to "conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." D.C. Code §11-743, Pub. L. No. 91-358 (1970).[1] The F.R.A.P. are prescribed by this Supreme Court of the United States under its authority set forth in 28 U.S.C. §2072, and interpretation of the F.R.A.P. bearing on Rule 4 notice of appeals and cross-appeals has recently supported allowance of a writ of certiorari. *Zapata Industries v. W.R. Grace & Co.*, 540 U.S.

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1. Compare the respondents' reference, brief at 13, to *Miller v. Anderson*, 150 U.S. 132, 136 (1893), in which jurisdiction was denied by this Court because the entire appeal centered on "not what rights passed to the state under the acts of Congress, but what authority the railroad company had under the statute of the state." (emphasis added).

____, 123 S. Ct. 31, dismissed by parties, Sup. Ct. R. 46.1, 123 S. Ct. 551 (2002).

This Words, Inc. Petition centers on the D.C. Court of Appeals interpretation of its own procedural rules that have been ordained by Congress to remain in perfect *pari materia* with the F.R.A.P. This petition thus involves a federally-chartered court in a unique, federal-enclave, subject to a federal statute that the court obey federal appeal rules.[2] Notably, Congress has barred the D.C. Council from altering the adoption of F.R.A.P. or from making any changes in the organization of the District of Columbia courts. D.C. Code §1-206.02(a)(4). Owing to the unique setting of the District of Columbia in the Constitution, Article One, §8, this Court has repudiated the respondents' facile argument that Acts of Congress pertaining to the District of Columbia should be treated as state statues for 28 U.S.C. §1257 inquiry. *Palmore v. United States*, *supra* at 1.[3] When the Congressional Act

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2. *Griffin v. United States*, 336 U.S. 707 (1948), cited by respondents for the argument that District of Columbia rules of evidence are purely local, is not relevant to this question concerning F.R.A.P. and was decided before the Congress granted limited home rule with a court system in the District of Columbia. See petitioner's discussion of *Key v. Doyle*, 434 U.S. 59 (1977) and *Palmore v. Untied States*, 411 U.S. 389 (1973), *infra*. Congress has not acted to impose the Federal Rules of Evidence upon the D.C. Court of Appeals.

3. Though not cited by respondents, *Key v. Doyle*, 434 U.S. 59 (1977), does not bar certiorari here. *Key v. Doyle* was decided before 28 U.S.C. §1257 was amended in 1988. *Key v. Doyle* held that an 1801, District of Columbia statute regulating devises and bequeaths to religious charities did not present a federal question for direct appeal to the Supreme Court after a D.C. Court had voided the local law for putative violation of First Amendment and Due Process Clause: "no

does, like D.C. Code 11-743, impose the nationwide F.R.A.P. upon a D.C. court, the presence of a federal question is unmistakable. "There is a distinction between an Act enacted for a purpose which is exclusive to the District of Columbia, and a statutory scheme which applied to the District of Columbia, as well as other entities." *Roth v. D.C. Courts*, 160 F. Supp. 2d 104, 108 (D.D.C. 2001).

When the federal question of the notice of appeal, functional equivalent doctrine matured before the D.C. Court of Appeals at petitioner's urging, it could no longer be disposed of on "non-federal" grounds. Supplemental Appendix No. 1 illustrates the extent to which petitioner pressed the F.R.A.P. functional equivalent argument to the D.C. Court of Appeals, requesting that this lower court reverse its denial of jurisdiction and consider the May 30, 2002 documents filed with the trial court as the functional equivalents of a timely notice of appeal of the May 15, 2002 summary judgment for defendants-respondents.[4] Though the

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right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application." *Key v. Doyle*, 434 U.S. at 68-69. By contrast, the Congress in 1970 used Pub. L. No. 91-358 to impose federal law and procedure upon the D.C. Court of Appeals. No serious argument can be made that D.C. Code §11-743 is merely " law of exclusively local application."

4. Respondents cannot argue that the failure of the D.C. Court of Appeals to take up the functional equivalent, notice of appeal issue under F.R.A.P. is an assertion of local variance. The D.C. Court of Appeals has interpreted its rules using analogous federal precedent for other notice of appeal controversies. Petition at 10-11. The functional equivalent, notice of appeal rule has also been applied by the U.S. Court of Appeals to accept disputed notices of appeal. See Petition at 8.

D.C. Court of Appeals did not favor the parties or this Court with a full opinion on the federal question, that silence cannot dispel the conclusion that the D.C. Court of Appeals thought it was complying with federal law when rejecting petitioner Words, Inc.'s functional equivalent argument and scuttling its appeal. *See Arizona v. Evans*, 514 U.S. 1, 7 (1995)(even if not clear from face of state court decision, federal questions is presented because this Court can assume state court believed it was complying with federal law); *Lee v. Kemna*, 534 U.S. 362, 375 (2002)(adequacy of state grounds is itself a federal question).

Respondents are unable to identify any instance in which the D.C. Court of Appeals has wielded the local variance language in D.C. Code §11-743, *i.e.*, "unless the court prescribes or adopts modifications of those Rules," to avoid application of this Court's functional equivalent rule for notices of appeal stated in *Smith v. Barry,* 502 U.S. 244 (1992) and *Houston v. Lack*, 487 U.S. 266 (1988).4 The texts of the disputed D.C. App. Rules 3 and 4 is sufficiently verbatim to F.R.A.P. 3 and 4 that no local variance argument is even presented. App. 13-16. Because denial of appeal jurisdiction by the D.C. Court is so contrary to this Court's jurisprudence on the functional equivalent interpretation for notices of appeal under F.R.A.P. 3 and 4, these respondents understandably make no effort to refute petitioner's reliance on this Court's Rules 10(b) and 10(c) to allow the writ. Abridgement of petitioner's rights under an Act of Congress and F.R.A.P., require assertion of this Court's supervisory authority and granting of the writ.

2. The Petition is Timely in All Respects.

The Respondents' argument that the present Petition is untimely is built upon the flawed premises that multiple petitions for rehearing are absolutely barred in the D.C. Court of Appeals and that the lower court did not rule on the merits of the federal question. Petitioner Words, Inc.'s efforts to invoke appeal jurisdiction on the basis of the May 30, 2002 appeal-intent documents, was part of an effort to have the D.C. Court of Appeals reverse its original (November 27, 2002, App. 49) dismissal of Words, Inc.'s appeal. Even if the new round of motions on the functional equivalent, notice of appeal issue was untimely under the D.C. App. Rules, the D.C. Court of Appeals considered and rejected petitioner's alternative-document, notice of appeal argument, which was based wholly on F.R.A.P. and federal precedent. *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 21, n. 1 (1952)(circuit court's denial of untimely motion to amend original merits ruling started 90-day clock for petition to this Court). The October 24, 2003 Petition for Writ of Certiorari is timely under these circumstances.

No rule of the D.C. Court of Appeals blocked Petitioner Words, Inc. from filing its December 11, 2002 "Motion to Invoke Appeal Jurisdiction pursuant to May 30, 2002, Rule 41(a)(1) Notice to Superior Court Stating Intent to Appeal and May 30, 2002 'Rule 59(e)' Motion, Each Providing Functional Equivalent of D.C.C.A. Rule 3(a) Notice of Appeal," reprinted in Supplemental Appendix No. 1 at 2-11. The December 11, 2002 Motion was accompanied by a Motion to Stay Mandate and a Petition for Rehearing and

Rehearing En Banc that incorporated the December 11, 2002 Motion and asked the D.C. Court of Appeals to grant jurisdiction on the basis of the two appeal-intent documents filed in the trial court on May 30, 2002. Supp. App. No. 1 at 14-16.

Respondents' current objection to the Petition for Writ as untimely would have traction only if the D.C. Court of Appeals had refused to consider the December 11, 2002 Motion incorporated into the first Petition for Rehearing En Banc, or if the Court of Appeal itself deemed the second round of briefing on the notice of appeal as untimely.[5] The record shows that the D.C. Court of Appeals did have a three-judge panel consider Words, Inc.'s motion to invoke appeal jurisdiction through the May 30, 2002 appeal-intent documents, but the motion was denied. App. 52. Because the denial of the motion to invoke appeal jurisdiction through the May 30, 2002 documents had not been circulated to the D.C. Court of Appeals *en banc*, petitioner Words, Inc. on March 12, 2003 filed a Petition for Rehearing En Banc of the denial of the December 11, 2002 motion to invoke appeal jurisdiction, accompanied by a Motion to Stay issue of the D.C. Court of Appeals mandate. Supp. App. No. 1 at 27-35. The court below circulated this March 12, 2003 Petition for Rehearing En Banc for several months, finally issuing a denial order dated June 26, 2003, App. 53. The lower court never declared Words, Inc.'s second round of briefing on the

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5. D.C. App. R. 14 authorizes the D.C. Court of Appeals to dismiss an appeal for failure to comply with that court's "rules or for any other lawful reason."

notice of appeal issue to be untimely.

In a case decided in the same term as the *Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 412, 415 (1952), relied upon heavily by respondents, brief in opposition at 8-10, this Court approved filing of a Petition for Certiorari within 90 days of a modified judgment against the Federal Power Commission issued by the U.S. Court of Appeals for the D.C. Circuit, largely because the government's "motion for clarification" though untimely under the circuit court's rules, was "entertained and considered on the merits." *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 21, n. 1 (1952). This Court should emphatically reject respondents' unsupported and fanciful assertion in their opposition brief at 11 that Words, Inc.'s March 12, 2003 Petition for Rehearing En Banc was "not entertained or considered on its merits. . . .because the rule of the District of Columbia Court of Appeals did not allow for filing of a second petition for rehearing." Appendix 53 proves that the March 12, 2003 Petition for Rehearing, which was built upon the December 11, 2002 Motion to invoke jurisdiction on the May 30, 2002 appeal-intent documents, was considered by the merits panel and the entire court, and then denied, with no reference to timeliness. These facts constitute a final judgment on the federal question that, like the D.C. Circuit order in *Federal Power Comm. v. Idaho Power Co., supra,* at 1, was properly subject to a Petition for Certiorari filed 90 days thereafter.

In addition to not citing or distinguishing *Federal*

Power Comm. v. Idaho Power Co., the respondents are unable to shoehorn their largely hoary precedents into the procedural setting of this District of Columbia civil matter now subject to a Petition for Writ of Certiorari. As stressed by petitioner in its petition at 7, this District of Columbia court litigation necessarily came to turn on construction of an important Federal law question as to applicability of functional equivalents of F.R.A.P. notices of appeal, see *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). The federal question presented is the Congressional requirement in D.C. Code §11-743 that the D.C. Court of Appeals follow the Federal Rules of Appellate Procedure, which necessarily includes obeying this Court's interpretation of the Federal Rules of Appellate Procedure as to functional equivalents for notices of appeal. In the lead case cited by respondents, *Nebraska Dept. of Banking v. Pink*, 317 U.S. 264 (1942), the petitioner filed a post-judgment motion with the N.Y. Court of Appeals seeking *not to amend the judgment* but merely to have the Court of Appeals confirm that a federal question was presented and had been passed upon by that state court. The contrast with petitioner Words, Inc. and the unsuccessful petitioner Nebraska Dept. of Banking is striking: Words, Inc. used the motions practice of the D.C. Court of Appeals to request that court to reverse its November 27, 2002 denial of jurisdiction and to bring to that court's attention the appeal-intent documents filed with the trial court within 30 days of the merits' order granting summary judgment to the legal malpractice defendants. This petition is squarely governed by *Federal Power Comm. v. Idaho Power*

Co., and not by *Nebraska Dept. of Banking v. Pink.*

Words, Inc.'s Petition should also not be judged under the timeliness criteria of *Federal Trade Comm. v. Minneapolis-Honeywell, R. Co.*, 344 U.S. 206 (1952), cited by respondents in their opposition brief at 8-10. Both the FTC and Minneapolis-Honeywell petitioned the Seventh Circuit over a three-prong penalty order entered by the Commission against Minneapolis-Honeywell for alleged violations of the Robinson Patman Act, 15 U.S.C. §13. On July 5, 1951, the Seventh Circuit vacated Part III of the Commission's order but did not address the Commission's cross-appeal that requested affirmance of all three sections of the Commission order. Well outside the time for a petition for rehearing to the U.S. Court of Appeals for the Seventh Circuit, the FTC filed a "memorandum" with that court reminding the court to sustain Parts I and II of the Commission order *but, like the unsuccessful petitioner in Nebraska Dept. of Banking, supra, not seeking any relief as to the Seventh Circuit's ruling on Part III.* On September 18, 1951, the Seventh Circuit issued what it called a "Final Decree" again ordering Part III reversed and affirming Part I and Part II. When the FTC petitioned for certiorari marking 90 days from the September 18, 1951 court of appeals decision, this Court, over a vigorous dissent by Justice Black, applied a practicality test to find that, because the September 18, 1951 decision was not preceded by a request to alter the July 5, 1951 decision as to Part III, the 90 day time for petitioning for certiorari should commence running from the July 5, 1951 date. *Federal Trade Comm. v. Minneapolis-*

Honeywell R. Co., 344 U.S. at 210. The government's petition was thus determined to be untimely.

In the present case, the federal question pertaining to applying F.R.A.P. principles to Words, Inc.'s May 30, 2002 appeal-intent documents, was not before the D.C. Court of Appeals until Words, Inc. filed the December 11, 2002 Motion to Invoke Appeal Jurisdiction using the May 30, 2002 appeal-intent documents as the functional equivalents of a 30-day notice of appeal. The additional briefing by Words, Inc. on the functional equivalent, F.R.A.P. argument is contained in petitioner's supplemental appendix. All of these filings sought to overturn the D.C. Court of Appeals November 27, 2002 rejection of Words, Inc. appeal. Words' Petition for Certiorari filed within 90 days of the D.C. Court of Appeals ultimate disposition of Words, Inc.'s attempt to reverse the court of appeal's original jurisdictional ruling, was timely in all respects.

Conclusion

The important federal question regarding denial of petitioner's rights under an Act of Congress applying to a District of Columbia court, warrants allowance of this timely petition for writ of certiorari.

Respectfully submitted,

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